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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

GRACE E. BESSAY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

The Cape Cod National Seashore Act (the "Act") contains an exemption from the eminent domain authority granted by Congress to the Department of the Interior (the "Department"). Petitioner's right to this exemption for her historic dune cottage has been denied because the Department has construed "dwelling," as that word is used in the Act, to exclude this cottage, and other private residences like it, from the Act's protection against eminent domain takings. The Department bases its definition of the word "dwelling" on state and municipal health regulations. Reliance on state and municipal health regulations is not authorized by the Act, the regulations

promulgated by the Department thereunder, or the legislative history.

The question presented is:

Whether the Court below violated important principles of statutory construction and frustrated the intent of Congress by relying on state and municipal health regulations to define the word "dwelling" and therefore holding that petitioner's cottage was not "improved property" entitled to the exemption from taking under the Act.

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioner, Grace E. Bessay, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on November 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 889 F.2d 352, and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the District of Massachusetts (Nelson, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 25a, *infra*.

JURISDICTION

In accordance with 40 U.S.C. §257 and §258a, respondent filed a declaration of taking and a complaint in the United States District Court for the District of Massachusetts ("District of Massachusetts") on December 29, 1967. The district court had jurisdiction over this case under 28 U.S.C. §1358. On

September 15, 1988, the District of Massachusetts issued a Memorandum and Order. See p. 25a, *infra*.

On petitioner's appeal, pursuant to 28 U.S.C. §1291, the United States Court of Appeals for the First Circuit ("First Circuit") on November 17, 1989 entered a judgment and opinion affirming, in part, the judgment of the District of Massachusetts. See p. 1a, *infra*. No petition for rehearing was sought.

This petition for a writ of certiorari is filed within ninety (90) days of the judgment below, as prescribed by law. 28 U.S.C. §2101(c). The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE AND REGULATION INVOLVED

Cape Cod National Seashore Act, 16

U.S.C. § 459b. *See* p. 43a, *infra*.

36 C.F.R. §§27.1 through 27.4, Cape Cod National Seashore; Zoning Standards. *See* p. 81a, *infra*.

STATEMENT OF THE CASE

This case arises out of the attempted taking by the United States Department of the Interior ("Department") of petitioner Grace E. Bessay's cottage, in contravention of explicit statutory protections of the Cape Cod National Seashore Act, 16 U.S.C. §459(b), Pub. L. No. 87-126, 75 Stat. 284 (the "Act"). Congress enacted this legislation in 1961 to create a national seashore on outer Cape Cod which would encompass thirty thousand acres within the six towns of Chatham, Eastham, Orleans, Wellfleet, Truro, and Provincetown, Massachusetts. Recognizing that the area already was heavily populated by year-round and seasonal homeowners, Congress specifically created a statutory "improved property" exemption from

acquisition by the United States for pre-existing residential dwellings. *See* 16 U.S.C. §459b-3(b). "Improved property" is defined in the Act as follows:

> The term "improved property," wherever used in this Act, shall mean a detached, one-family dwelling the construction of which was begun before September 1, 1959 (hereinafter referred to as 'dwelling'), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the sole purpose of noncommercial residential use....

16 U.S. C. §459b-3(d).

The Secretary of the Interior ("Secretary") promulgated "regulations specifying standards for approval by him of zoning bylaws" to be enacted by each of the towns affected by the Act. 16 U.S.C. §459b-4. Once these regulations

had been promulgated, and the Secretary had approved an affected town's zoning bylaws, then the Department's "authority [to take property by eminent domain] shall be suspended with respect to all improved property" in that town. 16 U.S.C. §459b-3(b). Provincetown has duly adopted and the Secretary has approved zoning bylaws in accordance with the provisions of 16 U.S.C. §459b-4.

Petitioner Grace E. Bessay ("Bessay") owns a cottage and 8.17 acres of land within Tract No. 8-P-1036 of the Cape Cod National Seashore in an area of the dunes in Provincetown, Massachusetts, known as the Peaked Hill. Bessay's cottage is typical of the other dune cottages at Peaked Hill. It has two rooms, and measures eighteen-and-a-half by sixteen-and-a-half feet, with a

five-foot wide porch along the length of the building. The cottage is equipped with a kitchen sink, a gas cooking stove, and a gas refrigerator. (A. 60, 98)[1]. The cottage does not have electricity or indoor plumbing. Like most Peaked Hill dune cottages it is lighted primarily with kerosene lamps. The cottage is supplied with potable water from its own well. (A. 99). The cottage has a chemical toilet for sanitary disposal of human wastes. (A. 41).

Bessay's property complies with each of the "Seashore District" zoning standards set forth in the Department's regulations and the Provincetown Zoning Bylaws. The preservation of Bessay's cottage, a permitted use in the Seashore

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[1] This and similar citations in this Petition refer to the page number in the Appendix of the printed record in the court below.

District, is compatible with the Act's goal of protecting the cultural values of the area and maintaining the distinctive Cape Cod character of existing residential structures. *See* 36 C.R.F. 27.3(b). The Bessay cottage is one of eighteen structures determined by the Keeper of the National Register of Historic Places, National Park Service, to be eligible for the National Register as a historic district. The proposed district also includes approximately 1500 acres of the dune landscape surrounding the eighteen cottages. *See* Appendix, p. 92 a, *infra*). In making this determination, the Keeper wrote:

> The importance of the dune shacks is embodied in their collective association with the historical development of the arts; their spartan, utilitarian form; and their unique relationship with the harsh dune environment.
> ....
> The shacks are the surviving

> material artifacts that convey the significant, continued historic use of the dunes' seaside setting over time.
> ....
> The dune shacks provided shelter while minimally intruding into the contemplative solitide of the environment that provided the impetus to an abundance of artistic and literary work. The shacks' unpretentious, predominantly one-room structure, their simple materials and craftsmanship, their mobility, and their lack of amenities such as electricity and running water enabled their inhabitants to experience a survivalist relationship with nature.

On December 29, 1967, the United States of America ("United States") filed a Complaint in Condemnation and a Declaration of Taking under its purported statutory authority under the Act. Judgment on the Declaration was filed the same day and allowed on January 3, 1968. Dorothy Fearing ("Fearing"), predecessor in title to Andrew D. Fuller, Jr. ("Fuller") and

Grace E. Bessay[2] duly filed an answer objecting to the purported taking of the property.

On January 30, 1978, the Beede Group filed a petition for determination of title and for distribution of just compensation, requesting a finding that they had a fee simple title at the time of the taking, and, therefore, a compensable interest in the entire Cape Cod National Seashore Tract No. 8-P-1036. Fuller disputed the Beede Group's alleged title to the northern portion of this tract.[3] The case was

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[2] On August 1, 1971, Fuller moved to intervene and be substituted as a party defendant in place of Fearing, alleging that he had acquired all of Fearing's rights, title and interest in the property by deed, dated December 12, 1969. Both Fearing and subsequently Fuller claimed that the property was "improved property" within the meaning of the Act, and therefore, was exempt from the taking.

[3] When Bessay acquired Fuller's interests, she also disputed the Beedes' alleged claim of title.

tried and eventually a judgment was entered holding that title to the entire Tract No. 8-P-1036 in fee simple was vested in the Beede Group, and that neither Fearing nor Fuller, Bessay's predecessors in title, had acquired by adverse possession title to any land contained within this tract. United States v. Certain Land Located in the County of Barnstable, 491 F.Supp. 1252, 1256 (D. Mass. 1980).

An appeal was entered in the U.S. Court of Appeals (Appeal Nos. 80-1462 and 80-1633) on September 8, 1980. In 1982 the Court of Appeals reversed the District Court judgment and remanded the case for further proceedings consistent with the First Circuit's opinion. United States of America v. Certain Land Located in Barnstable County, E. Bennett Beede, et al., 674 F.2d 90 (1st Cir.

1982). The U.S. Court of Appeals held, in pertinent part, that, "Bessay ... has possessory title tracing back through Fuller to Fearing, who bought the shack from Kleinman in 1939, along with any rights in the land or beach that Kleinman might have acquired." Id. at 95.[4]

A trial on the issue of the title dispute was held on June 21 - 22, 1988, and on September 15, 1988 Judge Nelson entered a Memorandum and Order, holding that Bessay owns by adverse possession 8.17 acres of the land to the north of the "hollow of the beach" while the Beede Group owns by adverse possession the remaining acreage to the north of the "hollow of the beach." United

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[4] The Appellate Court also held that "the Beedes were not only not the true owners [of the tract]; they could not even claim prior constructive possession of the lot by virtue of their deed...." Id at 95.

States v. Certain Land Located in the County of Barnstable, No. 67-988-N, slip op. at 4 (D. Mass. Sept. 15, 1988). ("Memorandum") In the Memorandum, Judge Nelson further held that Bessay's cottage does not constitute "improved property" within the meaning of the Act and, therefore, is subject to condemnation by the government. Id., at 6.

Bessay filed a timely appeal from this final decision in the U.S. Court of Appeals for the First Circuit, pursuant to 28 U.S.C. §1291, on September 26, 1988. Bessay appealed only that portion of the decision holding that her property is not "improved property" within the meaning of the Act, and, therefore, is subject to condemnation.

As it had done in prior cases interpreting the Act, the First Circuit

relied on local health code provisions not referenced in the Act to hold that, "Bessay's cottage does not qualify as a one-family dwelling." U.S. v. Certain Land in the County of Barnstable, 889 F.2d 352, 356 (1st Cir. 1989). This construction of the Act disqualified Bessay's cottage from the federal statutory "improved property" exemption from condemnation and taking found in the Act.[5]

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[5] The First Circuit did not reach the issue of whether Bessay's predecessor had sufficient interest in the land to qualify for the "improved property" exemption. Id. at 357.

REASONS FOR GRANTING THE WRIT

I.

PROPER CONSTRUCTION OF THE STATUTORY EXEMPTION TO THE EMINENT DOMAIN AUTHORITY IN THE CAPE COD NATIONAL SEASHORE ACT IS AN IMPORTANT QUESTION OF FEDERAL LAW.

When Congress enacted legislation to create the Cape Cod National Seashore,[6] it was well aware that it was embarking on a new national endeavor. The Seashore was one of the first reservations within the National Park System to be created east of the Mississippi River. Previously, the national parks, most of which were located in the western half of the continental United States, had been assembled primarily out of federal public domain lands and lands

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[6] Pub. L. 87-126, 75 Stat. 284 et seq., August 7, 1961.

transferred by state governments, private philanthropists and other federal agencies. The older national parks were created in areas which were primarily uninhabited and wild. The Cape Cod National Seashore, however, was created in a settled area where much of the land was privately owned.

In establishing a national seashore on outer Cape Cod, Congress did not intend to recreate a wilderness; rather it intended to prevent the overdevelopment which had begun to take place on the south shore of Cape Cod.[7] Congress intended to preserve the human element, the culture, the existing way of life on the outer Cape, along with the natural beauty.

Part of the existing way of life Congress intended to preserve was use of

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7 *See* pp. 30, 34, 37-39, *infra*.

the existing non-commercial, single-family homes, including seasonal homes. With this purpose in mind, Congress wrote the "improved property" exemption from condemnation into the Act.[8]

This "improved property" provision of the Act has been referred to as the "Cape Cod formula" and has served as a model for many subsequent acts of Congress creating other federal parks and conservation areas.[9] In addition to the thirty-one "National Parks, Military Parks, Monuments and Seashores" established under Chapter 1 of Title 16

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[8] *See* pp. 33-37, 41, *infra*.

[9] *See* Apostle Islands National Lakeshore: Hearings on S. 778 before the Sub. Comm. on Parks and Recreation of the Senate Comm. on Interior and Insular affairs, 99th Cong., 1st Sess. 37 (1967) (Comments of Senator Bible.)

of the U.S. Code,[10] there are also game

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[10] Redwood National Park Act, 16 U.S.C. §79d; Saratoga National Park Act, 16 U.S.C. §159g; Voyageurs National Park Act, 16 U.S.C. §160c; Jean Lafitte National Historical Park Act, 16 U.S.C. §230b; Olympic National Park Act, 16 U.S.C. §251h, Virgin Islands National Park Act, 16 U.S.C. §398d; Valley Forge National Historical Park Act, 16 U.S.C. §410aa; San Antonio Missions National Historical Park Act, 16 U.S.C. §410ee; Manassas National Battlefield Park Act, 16 U.S.C. §429b; Appomattox Court House National Historical Park Act, 16 U.S.C. §450e; Point Reyes National Seashore Act, 16 U.S.C. §459c; Fire Island National Seashore Act, 16 U.S.C. §459e, Assateague Island National Seashore Act, 16 U.S.C., §459f; Gulf Islands National Seashore Act, 16 U.S.C. §459h; Cumberland Island National Seashore Act, 16 U.S.C. §459i; Canaveral National Seashore Act, 16 U.S.C. §459j; Ozark National Scenic Riverway Act, 16 U.S.C. §460m-2; Buffalo National River Act, 16 U.S.C. §460m-9; New River Gorge National River Act, 16 U.S.C. §460m-16; Delaware Water Gap National Recreation Area, 16 U.S.C. § 460o; Whiskeytown-Shasta-Trinity National Recreation Area Act, 16 U.S.C. §460q; Pictured Rocks National Lakeshore Act, 16 U.S.C. §460s; Indiana Dunes National Lakeshore Act, 16 U.S.C. §460u; Apostle Islands National Lakeshore Act, 16 U.S.C., §460w; Sleeping Bear Dunes National Lakeshore Act, 16 U.S.C. §460x; Oregon Dunes National Recreation Area Act, 16 U.S.C. §460z; Golden Gate National Recreation Area Act, 16 U.S.C. §460bb; Big South Fork National River and Recreation Area Act, 16 U.S.C. §460ee; Cuyahoga Valley National Recreation Area Act, 16 U.S.C. §460ff; Chattahoochee River National Recreation Area Act, 16 U.S.C. §460ii; Santa Monica Mountains National Recreation Area Act, 16

and bird preserves administered by the National Wildlife Refuge System under Chapter 6 of Title 16,[11] and the National Wild and Scenic River System administered by the Department of Interior and the Department of Agriculture under Chapter 28 of Title 16,[12] as well as the Alaska National Interest Lands Conservation Act administered by the Secretary of Agriculture under Chapter 51 of Title 16.[13] In order to protect the private property interests of existing homeowners in the areas to be set aside, an "improved property" provision with identical or similar wording to that

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U.S.C. §460kk.

[11] Big Thicket Preserve Act, 16 U.S.C. §698a; Big Cypress Preserve Act, 16 U.S.C. §698h.

[12] 16 U.S.C. §1277.

[13] 16 U.S.C. §3192.

found in the Act was included by Congress in many subsequent acts creating national parks or conservation areas.

Homeowners across the country have property interests which depend upon the meaning given to the "improved property" provisions of these various Acts. As Congress creates additional national parks, recreation areas, and preserves (at a time when virtually all areas of the country have become settled), an "improved property" exemption from taking, similar to that found in the Act, will likely be included in future enabling legislation.

In a series of condemnation cases concerning properties on Cape Cod, the First Circuit has narrowly construed the word "dwelling" improperly to limit the application of the "improved property"

exemption Congress explicitly created. Principles of statutory construction prevent both the Department and a court from redefining statutory rights protecting private property from taking and condemnation. Specifically, courts do not have authority to redefine the Act so as to exclude a certain class of property owners from the protection afforded by the exemption, despite Congress' explicit efforts to protect their cherished property interests.

If a department of the executive branch is permitted to take liberties with the limited authorization by Congress for use of the eminent domain power, a precedent is set which compromises the sanctity of private property. The Fifth Amendment protection of private property is a cornerstone of our political and

economic system. Too often, the threat of condemnation has been used by the Department to coerce people into voluntarily giving up their land. See Comptroller General of the United States, Lands in the Lake Chelan National Recreation Area Should be Returned to Private Ownership, CED-81-10 (January 22, 1981); Comptroller General of the United States, The National Park Service Should Improve Its Land Acquisition and Management at the Fire Island National Seashore, CED-81-10, p. 13 (May 8, 1981).

Any hint of unfairness on the part of federal land managers in their formulation and administration of land acquisition policies will exacerbate the inevitable conflicts between federal land managers and local land owners. See Comptroller General of the United

States, The Federal Drive to Acquire Private Lands Should Be Reassessed CED-80-14, p. 11 (December 14, 1979). The Department of the Interior should not be allowed to ignore the few restrictions which Congress placed on the broad eminent domain authority of the Condemnation Act (40 U.S.C. §257 (1948)) when it enacted special legislation establishing specific parks. To allow the Department to do so threatens not only the fundamental private property rights of individual landowners, but the credibility of the federal land conservation and preservation effort.[14]

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[14] The resentment and distrust among the people of the seven Pennsylvania and eight New York towns within the Delaware Gap National Recreation Area towards the National Park Service was documented in Greer, "Fury Aroused by Plan to Manage the Delaware", New York Times, March 19, 1984, at B1, col.1. *See also* McKenna, "Fire I. Takeovers Stir New Criticism," New York Times, June 28, 1981, at Section XXI, p. 1, col. 1; and Barron, "Fire Islanders Fight U.S. for Their Property," New York Times, July 31, 1981,

Neither the Department nor the courts should be allowed to diminish individual property rights in derogation of the express goal of Congress to limit the eminent domain authority in these types of situations.

II.

THE FIRST CIRCUIT'S METHOD OF CONSTRUING THE ACT IS IN DIRECT CONFLICT WITH IMPORTANT PRINCIPLES OF STATUTORY CONSTRUCTION SET FORTH IN DECISIONS OF THIS COURT.

A. The First Circuit Ignored The Plain Meaning Of Unambiguous Language In The Act.

The linchpin of the First Circuit's opinion in this case is its adherence to the definition of "dwelling" (as that word is used in the "improved property" definition of the Act) that it

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at Section II, p. 2, col. 1. These two articles bring to light the controversy surrounding National Park Service land acquisition practices in the Fire Island National Seashore.

established in earlier cases. This definition of "dwelling" rests on the requirement that, to be considered a dwelling, a cottage must meet standards set forth in Massachusetts and Provincetown health regulations.

The health regulations are irrelevant. In relying upon them, the First Circuit violates a basic principle of statutory construction. "In cases of statutory construction, we begin with the language of the statute. Unless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning.'" Diamond v. Diehr, 450 U.S. 175, 182 (1980), *quoting* Perrin v. United States, 444 U.S. 37, 42 (1979); *Accord*, Burns v. Alcala, 420 U.S. 575, 580-581 (1975); Banks v. Chicago Grain Trimmers Assn., Inc., 390 U.S. 459, 465 (1968); Minor v.

Mechanics Bank of Alexandria, 1 Pet 46, 64 (1828); *See also* United States v. Apfelbaum, 445 U.S. 115, 121 (1980). In fact, there is a strong presumption that Congress expresses its intent through the language it chooses. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987). *See* United States v. James, 478 U.S. 597, 606 (1986); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The word "dwelling" should be given its "ordinary, contemporary, common" meaning. Diamond, 450 U.S. at 182. Commonly, "dwelling" is defined as "a place to live in; residence, abode." The American Heritage Dictionary of the American Language, Second College Ed., Houghton-Mifflin Co. (1985) ed. p. 431. Legally, dwelling is defined as, "The house or other structure in which a

person or persons live; a residence; abode; habitation; the apartment or building or group of buildings occupied by a family as a place of residence. Structure used as a place of habitation." Black's Law Dictionary, West Publishing Co., p. 454. (1979). When these common and legal definitions are applied to Bessay's cottage, it is clear that her cottage is a "dwelling." Therefore, she is entitled to the "improved property" exemption from condemnation and taking set forth in the Act.

If Congress had intended to give the "improved property" designation a more restricted meaning, it would have done so explicitly, as it has in other statutes containing the "improved property" designation. *Compare* 16 U.S.C. §459b-3(d) (Cape Cod National

Seashore Act) *with* 16 U.S.C. §459h-1(c) (Gulf Islands National Seashore Act).

Moreover, if Congress had intended to rely on state and local regulations as the means for determining whether a structure is a dwelling within the meaning of the Act it would have stated this intent. It did not.

This interpretation of the "improved property" exemption is in accord with "the common law rule of construction [which] requires that statutory powers to condemn be given a restrictive interpretation." U.S. ex rel. T.V.A. v. Welch, 327 U.S. 546, 551 (1946). The narrow scope of the power to take property for the purpose of creating a national seashore is highlighted by the explicit exemption for "improved property" established by Congress as an integral part of its

overall statutory scheme of preserving the existing way of life on Cape Cod.

The First Circuit also ignored textual statements of the purposes of the Act. Although the Act does not contain a preamble, the section addressing the administration of the Seashore by the Department contains language directing the administrator to establish policies consistent with the overall purpose of the Act:

> In order that the seashore shall be permanently preserved in its present state, no development or plan for the convenience of visitors shall be undertaken therein which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing or with the preservation of

> such historic sites and structures as the Secretary may designate[.]...

16 U.S.C. §459b-6(b)(1).

Congress clearly intended to preserve lower Cape Cod in its current state of development at the time of the passage of the Act, rather than as a wilderness. Furthermore, this section of the Act explicitly evidences Congressional intent to preserve cottages like Bessay's, which the Keeper of the National Register of Historic Places has determined to be historic.

B. The First Circuit Ignored And Summarily Misinterpreted The Legislative History Of The Act.

When the plain language of a statute is clear, the sole purpose of examining the legislative history is to determine if there is a "clearly

expressed legislative intention to the contrary to that language, which would require the Court to question the strong presumption that Congress expresses its intent through the language it chooses." Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980); *See also* Russello v. United States, 464 U.S. 16, 20 (1983); Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1983); Rubin v. United States, 449 U.S. 424, 430 (1981); Crooks v. Harrelson, 282 U.S. 55, 60 (1930). In this case, the legislative history adds compelling support to the conclusion that Congress never intended to restrict the application of the improved property exemption to a certain type of dwelling. An examination of the legislative history relevant to the term "dwelling" reinforces the unambiguous language of

the Act and the inescapable conclusion that Congress intended to include Bessay's cottage within the protection of the "improved property" exemption. There is not one statement in the extensive legislative history indicating that Congress intended to narrow the ordinary meaning of the term "dwelling." On the contrary, the legislative history is replete with abundant evidence that Congress specifically intended to include a variety of structures consonant with the seasonal habitation that traditionally characterizes the use of ocean property on lower Cape Cod, including simple cottages like Bessay's.

> The bill encourages the Department of the Interior to give the respected and responsible property owners of the lower Cape living within the seashore area and

> their children the most sympathetic consideration and cooperation; enabling them to hold and administer their property as they have in the past....

S. Rep. No. 428, 87th Cong., 1st Sess. 12, *reprinted in* 1961 U.S. Code Cong. & Ad. News 2212, 2221.

On September 3, 1959, then Senator John F. Kennedy stated, when introducing S.2636 on the floor of the Senate:

> Cape Cod is more heavily settled ...than most previous park areas.... We have therefore ... made several provisions which afford a method by which the threat of residential property condemnation can be eliminated by local action.
> ....
> In any of the six towns which adopt

> zoning meeting standards defined by the Secretary of the Interior, all homeowners in those towns whose property lies within the diagram of the Park are assured of the right to continue to own and occupy their home without interruption or interference so long as the zoning is kept in force.

105 Cong. Rec. 17888 (1959). (Emphasis added.)

Conrad L. Wirth, Director of the National Park Service, stated:

> This bill states that we have no power of domain over a home. Therefore that home can remain there as long as it complies with the zoning which the Secretary of the Interior approves, namely, that it be kept as a residence.

Cape Cod National Seashore Park: Hearings on S.857 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess. 42 (1961). (Emphasis added.)

It is clear that the Act is designed to preserve the natural ecological balance of portions of lower Cape Cod, while permitting area residents to continue their unique lifestyle. As part of this balancing scheme Congress made a commitment to preserving private ownership of simple, residential homes which fit into the natural ecological balance more readily than large homes equipped with the modern conveniences and utilities more typically found in cities and towns.

> Generally, the seashore proposal involves open and forested lands and

> some portions with scattered homes and cottages. Included are a few isolated groups of cottage rental units of primitive seashore type and several small snack and curio stands. By and large, the homes and cottages are seasonal in use, and, until recent years, widely scattered.

S. Rep. No. 428, 87th Cong., 1st Sess. 9-10 *reprinted in* 1961 U.S. Code Cong. & Ad. News 2212, 2218. (Emphasis Added.)

The remarks of the Honorable John F. Kennedy explicitly recognize the unique way of life that is an integral part of Cape Cod:

> Each of us has felt that a National Park on Cape Cod was justified only on a strong showing that this was the most effective means of maintaining this

> historic way of life and scenic integrity of the Cape...

105 Cong. Rec. 17887 (1959). (Emphasis added.)

The legislative history of the Act contains a recurring theme that private ownership and historic/cultural preservation are of equal importance with scenic, scientific and recreational preservation in the creation of the Cape Cod National Seashore. The Act was designed to preserve this delicate balance.

> Lower Cape Cod cannot be considered solely as a geographical area with certain physical characteristics. The Lower Cape must also be viewed as a way of life - a culture- which though conditioned by its environment finds its essence

> in the people who have lived and are living there. This bill seeks to preserve the way of life which these people have established and maintained on the Cape.

S. Rep. No. 428, 87th Cong., 1st Sess. 19, *reprinted in* 1961 U.S. Code Cong. & Ad. News 2212, 2227. (Emphasis added.)

The Act specifically establishes an administrative mandate that the area be managed "in such a way as not to diminish the value of enjoyment of any residential property in the seashore..." Id., at 29, *reprinted* at 2236. Clearly, the cultural significance and continued private ownership of Bessay's existing dwelling is encompassed within the way of life Congress sought to protect.

Congress specifically referenced certain groups of seasonal dwellings

they intended to exempt from condemnation. Bessay's cottage is one of approximately ten such cottages located in Provincetown.

> In 1957, there were 1,136 seasonal homes and 554 all-year residences in the town of Eastham. Within the Eastham portion of the proposed seashore, there were 98 seasonal homes and 60 all-year residences. In Truro there were 665 seasonal homes and 207 all-year residences, with 185 seasonal and 68 all-year residences within the proposed area. There are 5 to 7 seasonal homes within the proposed area in Orleans, about 10 in Provincetown and 5 to 7 in Chatham ranging in value from $200 to

$2,000.[15]

Id., at 10, *reprinted* at 2219. (Emphasis added.)

The Congressional intent to exempt from condemnation seasonal dwellings, like Bessay's, located in the Provincetown portion of the National Seashore, is inescapable. Senator Bible stated on the floor of the Senate on June 27, 1961 that:

> Great care has been taken in the bill to provide for the continued ownership and use of the rather substantial number of private homes which exist on Cape Cod within the suggeste

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15 The reference to dwellings within the National Seashore ranging in value from $200 to $2,000 bolsters an interpretation of the Act that includes dune cottages like Bessay's within the legislative exemption. Even in 1957, it is unlikely that homes valued at $200 could have been equipped with modern utilities such as electricity and modern indoor plumbing.

> boundaries of this national seashore. The report delineates in detail, on page 10, the homes which are located within the proposed boundaries of the Cape Cod National Seashore. So long as the homes in private ownership are maintained in accordance with zoning provisions adopted by the affected towns that conform to standards established by the Secretary of the Interior, the Secretary's authority to condemn such private property will be suspended.

107 Cong. Rec. 11391 (1961).

Bessay's unrefuted testimony that thirteen homes in the Provincetown area of the National Seashore existed in 1957 leads to the logical conclusion that her cottage was one of the "about 10"

seasonal homes referred to in Senate Report No. 428 (A.85-88). Other testimony offered at trial further established that other existing homes located in the Provincetown portion of the National Seashore are, in fact, similarly designed and lack electricity, septic systems, running water and other modern amenities (A.43-75). The United States has never presented any evidence that the Peaked Hill cottages are not the ones referred to in the legislative history. It is not surprising that Congress intended to protect seasonal dwellings as well as year-round domiciles since their persistent existence exemplifies the very way of life the Act seeks to preserve and is compatible with the National Seashore.

The First Circuit's decision

depriving Bessay of the benefits of the "improved property" exemption amounts to judicial legislation. Such a result is intolerable and flies in the face of established principles of statutory construction. Congress created the Cape Cod National Seashore by establishing a comprehensive program designed to preserve both important natural resources and cherished property rights. Congress, not the courts, has the sole authority to amend or alter the scope of any protection given to property owners under the Act. United States v. James, 478 U.S. 597, 612 (1986); *Also* Alyeska Pipeline Co., v. Wilderness Society, 421 U.S. 240, 269 (1975); Director, Workers' Comp. Programs v. Rasmussen, 440 U.S. 29, 47 (1979). Congressional intent to include cottages like Bessay's within

the improved property exemption is evidenced by the unambiguous language Congress employed in the Act. The legislative history buttresses this conclusion. If the First Circuit decision is allowed to stand, a dangerous precedent toward judicial legislation will be established, potentially affecting thousands of property owners across the country. Such a result is particulary onerous where, as here, the result expands the limited power of eminent domain which Congress granted the Department.

C. The First Circuit Improperly Relied On State And Municipal Law In Construing The Meaning Of The Term "Dwelling" As Used In A Federal Statute.

The First Circuit denied Bessay the protection of the "improved property" exemption solely because her cottage

does not meet the technical standards of local health codes. This reasoning violates principles of statutory construction and results in a usurpation of Congress' sole authority to enact legislation. Federal law should not be defined or narrowly construed by reliance on state or municipal codes addressing unrelated issues.

In NLRB v. Natural Gas Utility District, 402 U.S. 600, 603 (1971), this Court adopted as correct law the axiom from NLRB v. Randolph Electric Membership Corp., 343 F.2d 60, 62-63 (1965): "In the absence of a plain intention to the contrary, ... 'it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law. Jerome v. United States, 318 U.S. 101,

104 (1943).'" Using standards found in state and municipal health regulations to define a term in a federal statute is contrary to important principles of federalism. Such an approach also results in a lack of uniformity in the application of the federal statute, and, as in this case, a model statutory scheme. Congress established certain statutory rights under the Act, and under statutes modeled after the Act, which should apply uniformly to all persons within the benefitted class designated by Congress. These rights should not be limited by reference to a local regulation not referenced by Congress.

Furthermore, the First Circuit's construction of the statute violates the separation of powers doctrine. By relying on the regulations of agencies

of the executive branch (i.e. the Massachusetts Department of Public Health and the Provincetown Health Department) the First Circuit sanctions an impermissible encroachment of the executive branch on the legislative domain. Congress has not delegated any authority to administer or interpret the statute, or to define a term in that statute, to these local agencies. Even if these were federal agencies, the absence of delegation would make reliance on their regulations to construe this Act impermissible.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that Certiorari be granted and the case set down for briefing and oral argument; or, in the alternative, that Certiorari be

summarily granted, judgment below vacated and the case remanded to the lower court with instructions for a decision consistent with a holding that petitioner Grace E. Bessay's cottage is a "dwelling" as that word is used at 16 U.S.C. §459b-3(d), and therefore on that ground is entitled to the "improved property" exemption of 16 U.S.C. §459b-3(b).

Respectfully submitted,

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February 15, 1990

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-2029

UNITED STATES OF AMERICA
Plaintiff, Appellee,

v.

CERTAIN LAND LOCATED IN THE COUNTY
OF BARNSTABLE ETC., ET AL.,
Defendants, Appellees,

GRACE E. BESSAY,
Defendant, Appellant.

JUDGMENT

Entered, November 17, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Francis P. Scigliano
Clerk

[cc: Messrs. Axelrod and Shilton]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-2029

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

CERTAIN LAND LOCATED IN THE COUNTY OF BARNSTABLE, ETC., ET AL.,

Defendants, Appellees.

GRACE E. BESSAY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. David S. Nelson, U.S. District Judge]

Before
Bownes and Torruella, Circuit Judges,
and Re,* Judge.

Jeffrey B. Axelrod with whom Cynthia L. Amara, Gregor I. McGregor, McGregor, Shea & Doliner, P.C., William P. Homans, Jr., and Homans, Hamilton, Dahmen & Marshall were on brief for appellant.

David C. Shilton, Appellate Staff, Land & Natural Resources Division, with whom Donald A. Carr, Acting Assistant Attorney General, Jeremiah T. O'Sullivan, United States Attorney, Nicholas C. Theodorou, Assistant United States Attorney, Jacques B. Gelin, Maria A. Iizuka, Department of Justice, and Robin Lepore, Office of the Solicitor, Department of the Interior, were on brief for the United States.

November 17, 1989

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*The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

RE, JUDGE: Defendant-appellant, Grace E. Bessay, appeals from a judgment of the United States District Court of the District of Massachusetts which held that her "cottage" was not "improved property," and, therefore, was not exempt from condemnation under the Cape Cod National Seashore Act, 16 U.S.C. § 459b (1982) (the Act). The district court concluded that, "[f]irst, the cottage does not qualify as a one-family dwelling [,] [and] [s]econd, the evidence is insufficient to establish that the same person owned both the cottage and land on which it rested as of September 1, 1959." United States v. Certain Land Located in the County of Barnstable, No. 67-988-N, slip op. at 6 (D. Mass. Sept. 15, 1988).

The question presented on this appeal is whether the cottage owned by

Bessay is "improved property" within the meaning of the Act, and, therefore, exempt from condemnation.

Since we hold that the district court correctly held that Bessay's cottage was not "improved property" because it did not qualify as a "one-family dwelling," we affirm. Hence, it is unnecessary to decide the issue of the date of ownership of the cottage and the land.

BACKGROUND

This case is one of a series that resulted from the 1967 condemnation of 251 acres of land in Provincetown, Massachusetts, pursuant to the Act, by the United States Department of the Interior. It traces its origins to a dispute between Andrew Fuller, Bessay's predecessor in interest, and adjoining landowners, who are referred to as the

Beede Group. Fuller claimed ownership of a certain structure or "shack" and the surrounding land through the adverse possession of his predecessor in interest, Dorothy Fearing. On January 30, 1978, the Beede Group filed a petition for a determination of title, requesting a finding that they owned the entire 251 acres in question.

The District Court for the District of Massachusetts issued an order "declaring the Beedes to be seised and possessed of a good title to the entire tract in fee simple." United States v. Certain Land Located in the County of Barnstable, 491 F. Supp. 1252, 1256 (D. Mass. 1980). The court also declared that "Mr. Fuller ha[d] failed to show that the Fearings acquired a good title by adverse possession, and . . . [,] [therefore,] Fuller ha[d] no title to

any land on the locus and owns only the shack itself." Id. at 1257 (citations omitted).

The executrix of Fuller, Grace Bessay, appealed to this court, and we reversed on the question of adverse possession. We held that "[t]he Beedes were not only not the true owners, they could not even claim prior constructive possession of the lot . . . . Bessay, on the other hand, ha[d] possessory title tracing back through Fuller to Dorothy Fearing . . . ." United States v. Certain Land Located in the County of Barnstable, 674 F.2d 90, 95 (1st Cir. 1982). On that appeal, we declined to "reach any claim against the government on account of the shack or lot being 'improved property,'" and remanded the case to the district court. Id. at 96.

On remand, the district court made

certain determinations as to deed measurements and ownership of the land. Most pertinent here is its finding "that the cottage owned by Grace Bessay does not constitute 'improved property' under the Cape Cod National Seashore Act and is therefore subject to condemnation by the government." Certain Land Located in the County of Barnstable, No. 67-988-N, slip op. at 9. In the present case, Bessay appeals only that portion of the decision of the district court which relates to the "improved property" exemption under the Act.

DISCUSSION

Because the increasing popularity of Cape Cod threatened to jeopardize the historic and scenic integrity of the area, in 1961, Congress established the Cape Cod National Seashore Act, 16 U.S.C. § 459(b) (1982), to ensure the

preservation of the region. Rather than exclude all persons from owning or living on the land within the seashore, persons who had owned homes in the area for a certain period of time were permitted to remain.

In pertinent part, the Act provides that the authority of the Secretary of the Interior to acquire property in the Cape Cod region shall:

> (1) . . . be suspended with respect to all improved property located within such area in all of the towns referred to in section 459b of this title for one year following August 7, 1961.
> (2) thereafter such authority shall be suspended with respect to all improved property located within such area in any one of such towns during all times when such town shall have in force and applicable to such property a duly adopted, valid zoning bylaw approved by the Secretary in accordance with the provisions of section 459b-4 of this title.

16 U.S.C. § 459b-3(b) (1982) (emphasis added).

Under the Act, "improved property" is defined as:

> a detached, one-family dwelling the construction of which was begun before September 1, 1959 . . . together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated. The amount of the land so designated shall in every case be at least three acres in area, or all of such lesser amount as may be held in the same ownership as the dwelling . . . .

16 U.S.C. § 459b-3(d) (emphasis added).

As we stated in our decision in United States v. 7.92 Acres of Land (I), 769 F.2d 4, 8 (1st Cir. 1985), there is "no doubt that the 'improved property' exemption of the Act has been designed and interpreted to prevent the eviction of bona fide or actual homeowners from established residences, thereby accommodating 'the legitimate interests of existing residents.'" (quoting S.

Rep. No. 428, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2212, 2220) (emphasis in original).

In the present case the Town of Provincetown has enacted zoning ordinances approved by the Secretary. Consequently, in determining whether Bessay's cottage qualified for the "improved property" exemption, the district court had to decide whether the cottage was a "detached, one-family dwelling" within the statutory definition. The district court held that the cottage did not qualify for the exemption.

Bessay, in her brief, contends that the "plain language of the Act mandates that [the cottage] be classified as a dwelling entitled to improved property status." In her reply brief she further

argues that "[t]he Department improperly urges the [c]ourt to employ a theory of statutory interpretation that ignores the plain and ordinary meaning of the word 'dwelling.'" We disagree.

The nature and purpose of the Act, as well as the meaning of "dwelling," is not new to this court. In 7.92 Acres of Land (I), Bessay acquired two tracts of land in 1963 where there existed the remains of a structure that had been built in the 1930's. Bessay stated that, after 1959, but prior to 1963, the structure was partially burned. Sometime after 1963, the remaining portion of the structure was also burned. Bessay claimed that "since there [was] evidence that a 'dwelling' existed on her land prior to 1959, she ha[d] 'rebuilding rights,' and, therefore, [was] entitled to an exemption from

condemnation [as 'improved property'] under section 459b-3 of the Act." 7.92 Acres of Land (I), 769 F.2d at 7.

We held that "[s]ince there was no dwelling on Bessay's land at the time of the taking, and the land [was] unbuildable, . . . [Bessay] ha[d] no rebuilding rights . . . ." Id. at 9. In addition, we noted that:

> [T]he structure . . . was never served by utilities, had no waste disposal facilities, and permits for such services or facilities were never obtained or issued. Clearly, the legislative history and the case law interpreting the Act reveal that Congress did not intend to include within the definition of "improved property" the kind of structure which may have existed on Bessay's land.

Id. at 8; see generally P. Rohan & M. Reskin, Condemnation Procedures & Techniques § 14.04[4] (Supp. 1988).

In United States v. 7.92 Acres of Land (II), No. 86-1825, slip op. at 2 (1st Cir. Aug. 31, 1987), cert. denied,

108 S. Ct. 711 (1988), the structure in question "consisted of a ten by ten foot shack. It contained no plumbing, no electricity, no septic system and no foundation." (citations omitted). The structure contained a "chemical toilet [and] a primer stove." Id. Bessay stated that she "used rain water for washing and brought in fresh water for drinking." Id. In 1972, Bessay applied to the National Park Service for a Certificate of Suspension from condemnation on the ground that her property was "improved property" within the meaning of the Act. Her application was denied by the Department, and the district court held that the property was not "improved." See United States v. 7.92 Acres of Land (II), No. 75-3546-C, slip op. at 6 (D. Mass. Mar. 31, 1982). In affirming, we noted that, in

light of our discussion of "improved property" in 7.92 Acres of Land (I), and because of the lack of "permits for utility service or waste disposal," it was evident that "Bessay's property was not improved so as to suspend the Secretary's condemnation powers." 7.92 Acres of Land (II), No. 86-1825, slip op. at 2-3.

The structure in the present case, which is referred to by Bessay as a "cottage," consists of a two room wooden structure, eighteen and-a-half by sixteen-and-a-half feet, with a five foot wide porch along its length, on a foundation of wooden posts or pilings imbedded in the sand. The cottage has no plumbing, no electricity, no insulation, no built-in waste disposal or bathing facilities. It is lighted by kerosene lamps, and, is serviced by gas

appliances, a water pump located approximately 200 feet east of the structure, and a portable chemical toilet.

It cannot be questioned that, guided by what we have said in our prior cases, Bessay's cottage is not a "dwelling." Bessay, nonetheless, claims that the cottage at issue in this case differs from the structures that we examined in the prior cases. In her reply brief, she argues that, unlike the structure in 7.92 Acres of Land (I), where "there was no existing structure on the property, at the time of the taking, and the land was unbuildable because it was a coastal bank," here her cottage "has been located on the property at all times relevant to this appeal" and "has been inhabited continuously during the warmer months .

. . ." Furthermore, she adds that this case differs from the one in 7.92 Acres of Land (II) because in this case her "house and its foundation are significantly larger and more durable than those in [7.92 Acres of Land (II)]" and "[e]lectric utilities, have never been available at [this] site, whereas they were available at the . . . site [in 7.92 Acres of Land (II)]."

In our present inquiry it is noteworthy that the district court found that "[p]rior to trial, Bessay herself agreed that the structures in the present case and in United States v. 7.92 Acres of Land (II) . . . were substantially similar." Certain Land Located in the County of Barnstable, No. 67-988-N, slip op. at 7. Our examination of the record also confirms that, in a "Joint Status Report"

prepared before trial, Bessay did "agree that the structures in the present case and in [7.92 Acres of Land (II)] are substantially similar." Hence, notwithstanding the distinctions that are stressed by Bessay on this appeal, the district court was correct in concluding that the distinctions "are insufficient to convert the cottage into 'improved property.'" Id. Furthermore, from the description of the cottage and from what we said in our prior cases, it is clear that "Congress did not intend to include within the definition of 'improved property' the kind of structure which . . . existed [here]." See 7.92 Acres of Land (I), 769 F.2d at 8.

Notwithstanding the explanations offered at the trial and in Bessay's appellate briefs, it is crystal clear

that, without electricity and plumbing, the cottage did not meet the Minimum Standards of Fitness for Human Habitation promulgated by the Massachusetts Department of Public Health on March 8, 1955, and the Provincetown Health Department Regulations adopted on July 15, 1957.

The Provincetown Health Department Regulations require approved septic systems, piped in water supply and an adequate number of "water closets, lavatories, bathtubs or showers. . . ." The Regulations also state that "[e]very kitchen sink, lavatory and bathtub or shower . . . shall be properly connected to both hot and cold water lines." (emphasis in original). Additionally, the Massachusetts Minimum Standards of Fitness for Human Habitation require "a kitchen sink in good working condition

and properly connected to water and sewer systems . . . [and] [w]here connection . . . is not practicable, a dwelling shall be served by cesspools, septic tanks or other means of subsurface disposal of sewage . . . ."

At the trial, both Bessay and her witness, Peter Clemons, acknowledged that there are no pipes which connect a water supply to the cottage, that the kitchen sink is not connected to the water, that there is no bathtub or shower, and that there are no water heating facilities in the cottage. See Record at 60-61, 112, 116, Certain Land Located in the County of Barnstable, (No. 67-988-N). Hence, Bessay's contention that the cottage meets the criteria set forth in the Massachusetts Minimum Standards of Fitness for Human Habitation is contradicted by the facts

and the trial testimony.

In her reply brief, as an alternative argument, Bessay contends that the Department "incorrectly asserts that a structure must meet standards found in local and state health laws in order to be considered a 'dwelling' . . . ." (emphasis in original). According to Bessay, "[t]he Act merely provides that the Department shall issue regulations specifying standards for approval by the Department of a town's zoning bylaws." She asserts that "[t]he Provincetown Zoning Bylaw . . . does not make any mention of local or state health statutes . . . ." (emphasis in original).

The Act provides that the authority of the Secretary to acquire property by condemnation shall be suspended as to all improved property "when such town

shall have in force and applicable to such property a . . . valid zoning bylaw approved by the Secretary . . . ." 16 U.S.C. § 459b-3(b)(2). This provision, which suspends the Secretary's power to condemn improved property during the existence of a valid zoning bylaw, was enacted because "Congress could not enact local zoning ordinances to avoid condemnation . . . ." 7.92 Acres of Land (I), 769 F.2d at 8. The legislative history of the Act acknowledges that:

> If the Federal Government . . . is to establish a national seashore in such a way as not to interfere with the continued ownership and enjoyment of . . . property by private landowners . . ., it is only reasonable that the communities involved adopt zoning laws which will assure that the property within the seashore will be used in a manner consistent with the purposes of the seashore.

S. Rep. No. 428, 87th Cong., 1st Sess.,

reprinted in 1961 U.S. Code Cong. & Admin. News 2212, 2235. "Once such a bylaw is approved [by the Secretary], the Secretary becomes powerless to condemn improved property within that town[] . . . as long as that improved property is put to a use consistent with the bylaw." United States v. Certain Lands in Truro, 476 F. Supp. 1031, 1033 (D. Mass. 1979).

Prior case law had defined "improved property" consistently with the requirements of state and local law. It is not unreasonable, therefore, to look to this criteria when examining the cottage. Furthermore, as stated by the district court in United States v. 7.92 Acres of Land (II), "[w]hether a particular structure conforms with existing state health laws is pertinent, objective evidence with respect to its

legal status as a dwelling." No. 75-3546-C, slip op. at 6.

CONCLUSION

In agreement with our prior decisions as to the nature and purpose of the Act, and the findings and conclusions of the district court, we hold that the structure that is the subject of this litigation is not "improved property" within the meaning of the Cape Cod National Seashore Act.

Since we agree with the district court that Bessay's "cottage does not qualify as a one-family dwelling," and, therefore, is not exempt from condemnation as "improved property," we need not decide whether the land and the building were in the same ownership in September of 1959. Therefore, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. CERTAIN LAND LOCATED IN THE COUNTY OF BARNSTABLE, COMMONWEALTH OF MASSACHUSETTS, E. BENNETT BEEDE, et al., GRACE BESSAY, EXECUTRIX OF THE ESTATE OF ANDREW D. FULLER, JR., Defendants, GRACE E. BESSAY, INDIVIDUALLY, Defendant.	CIVIL ACTION NO. 67-988-N

NELSON, D.J September 15, 1988

MEMORANDUM AND ORDER

Pursuant to the Cape Cod National Seashore Act, 16 U.S.C. §§ 459b et seq., the United States of America filed a complaint and declaration of taking

against certain land located in the County of Barnstable, Massachusetts, on December 27, 1967. The instant controversy surrounds the ownership of a parcel of land described in the taking as containing 251 acres more or less and shown as Tract No. 8-P-1036. The Beede Group claims title to all of the land taken by the government in Tract No. 8-P-1036 except an 8.17 acre parcel shown on the plan entitled "Land Owned by Andrew D. Fuller, Jr., Provincetown, Mass." dated May 14, 1980 prepared by Frank Andrews (Exhibit 4) and described in the deed from Dorothy Fearing to Andrew I. Fuller dated December 12, 1969 (Exhibit 2). Grace Bessay claims title to the 8.17 acre parcel.

Guided by the mandate of the court of appeals in United States v. Certain Land Located in the County of

Barnstable, 674 F.2d 90 (1st Cir. 1982), this court held a trial on June 21-22, 1988 1) to determine the extent of land owned by the Beede Group, 2) to determine the ownership of the land located north of the hollow of the beach, and 3) to determine if the structure owned by Grace Bessay is exempt from condemnation as "improved property" under the Cape Cod National Seashore Act. Based upon the parties' memoranda, testimony, exhibits, and supporting documentation, this court finds and rules as follows.

A. The Measurements, Not the Monument, Control the Distance of the Northerly Boundary Line Described in the Bangs to Fisk Deed.

On December 28, 1987, this court determined that the Beede Group owned the land located to the south of the hollow of the beach as shown on Tract

No. 8-P-1036. It did not, however, determine the location of the northerly boundary line as described in the Bangs to Fisk deed. (Exhibit 3). This court now finds that the northerly boundary of the land as shown on Exhibits 5 and 8 runs 2640 feet, South 84° 29' 40" East, between the northerly points of two lines, the westerly line of which is 2,140 feet in a northwesterly direction from the northerly boundary of the State Highway, Route 6 and the easterly line of which is 2,415 feet in a northwesterly direction from the northerly line of the State Highway, Route 6.

Although the parties acknowledge the accuracy of these figures, the Beede Group contends that the northerly boundary line extends to the centerline of the hollow of the beach. In support

of this proposition, it argues that the Bangs to Fisk deed places the northerly boundary in the hollow of the beach, that the hollow of the beach is a monument, and that therefore the grantee takes title to the centerline of the monument. As a general rule in the construction of deeds, "monuments which are certain or capable of being made certain" prevail over measurements. Temple v. Benson, 213 Mass. 128, 132 (1912). However, where the location of the monument is indefinite and uncertain, the measurements control. Williston v. Morse, 51 Mass. 17, 26 (1845).

In the instant case, the deed description of the monument is by no means certain. The Bangs to Fisk deed places the northwesterly boundary at an "iron post in the hollow of the beach."

"In" could mean at the edge, middle or end of the hollow of the beach. Such a reference is hopelessly indefinite given that the hollow of the beach, essentially a dry valley lying between two dunes, is almost 600 feet in width. Because the location of the northerly boundary line cannot be made certain by reference to the hollow of the beach alone, this court finds that the deed measurements as described above control.

Accordingly, the Beede Group owns approximately 139.5 acres of land located south of the line in the hollow of the beach as shown on Tract No. 8-P-1036. (Exhibit 8).

B. The Beede Group and Bessay Own By Adverse Possession Certain Land Located North of the Line in the Hollow of the Beach.

The court next finds that Grace Bessay owns by adverse possession the 8.17 acre parcel of land shown on plan

entitled "Land Owned by Andrew D. Fuller, Jr., Provincetown, Mass." dated May 14, 1980 and prepared by Frank Andrews (Exhibit 4) and described in the deed from Dorothy Fearing to Andrew I. Fuller dated December 12, 1969 (Exhibit 2). While the court of appeals determined that Fearing's occupancy of the shack was "in her own right," it asked the district court on remand to determine the precise dimensions of her lot. United States v. Certain Land Located in the County of Barnstable, 674 F.2d at 96. Inasmuch as neither the Beede Group nor any other person has presented an adverse claim to this land and based upon the general adverse use of the surrounding land by her predecessor in title, Dorothy Fearing, this court finds that Bessay holds title by adverse possession to the 8.17 acre

parcel.

This court also finds that the Beede Group owns by adverse possession title to the remaining land on Tract No. 8-P-1036 located north of the line in the hollow of the beach. (Exhibits 8 and 8a). E. Bennett Beede, testified that he spent summers in Provincetown starting in 1914 and went on the land substantially every year since he could remember. The Beede family thought they owned the land and actually paid real estate taxes on it. Shortly after World War II, the town commenced to assess taxes for the shacks on the land assessed to the Beede family. The Beede family, in turn, assessed the shack owners rent on the shacks. All of the shack owners, except the Fearings, paid this rent to the Beede family.

The Beede family also held itself

out as the owner of the land located north of the line in hollow of the beach, land on which the government had built a coast guard station in 1919. In 1933, when the shoreline eroded and threatened the station's existence, the government sought and received permission from Mr. Beede's father to move the station further back on his land. Mr. Beede eventually purchased the station from the government when it was decommissioned after World War II and he subsequently continued to maintain it and the surrounding land. Finally, prior to 1967, the Beede family acquired title to 32.25 acres of land claimed by Nicholas Wells as shown on exhibit 5.

Based on the foregoing findings, this court holds that the Beede family's use of the land north of the hollow of

the beach except for the 8.17 acre Fearing lot was actual, open, notorious, exclusive, and adverse for more than 20 years. Ryan v. Stavros, 348 Mass. 251, 262 (1964).

C. Bessay's Cottage is not "Improved Property" Within The Meaning of the Cape Cod National Seashore Act.

Bessay claims that her cottage known as "Whatdoicare" is "improved property" within the meaning of the Cape Cod National Seashore Act and that therefore the government is not authorized to condemn it. The Act defines "improved property" as a "detached one-family dwelling the construction of which was begun before September 1, 1959 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the

same ownership as the dwelling... for the sole purpose of noncommercial residential use. . . ." 16 U.S.C. § 459b-3(d). This court finds that the cottage is not "improved property" for two reasons. First, the cottage does not qualify as a one-family dwelling. Second, the evidence is insufficient to establish that the same person owned both the cottage and land on which it rested as of September 1, 1959.

The First Circuit has had occasion to expand upon the phrase "improved property." Previous cases essentially hold that to qualify as a dwelling, the structure must be legally habitable. See United States v. 7.92 Acres of Land (II), No. 86-1825, slip op. at 2 (1st Cir. Aug. 31, 1987) (structure was not improved property in that it "was not serviced by utilities and... no permits

for utility service or waste disposal service were obtained"); United States v. 7.92 Acres of Land (I), 769 F.2d 4, 8 (1st Cir. 1985) (structure was not improved property because it "was never served by utilities, had no waste disposal facilities, and permits for such services or facilities were never obtained").

Bessay attempts to distinguish her cottage from the structures previously litigated. She argues that her cottage is larger than the "ten by ten foot shack" examined by the First Circuit in 7.92 Acres of Land (II) because it has an "enclosed area of 18 1/2' by 16 1/2' and a porch of 18 1/2' by 5 1/2'." She also argues that her cottage rests on a solid foundation of wooden posts rather than sitting on cement blocks. Such distinctions, however, are insufficient

to convert the cottage into "improved property." Prior to trial, Bessay herself agreed that the structures in the present case and in United States v. 7.92 Acres of Land (II), Civil Action 75-3546-C, were substantially similar. Like the structure in 7.92 Acres of Land (II), the "Whatdoicare" cottage contained no plumbing, no electricity, no bath or septic systems, no foundation, and no insulation. Rather, the cottage was serviced by a portable chemical toilet, kerosene lamps, and a pump 200 feet east of the shack.

At trial, Bessay and a witness testifying on her behalf, Peter Clemens, acknowledged that the cottage could have been serviced by electricity if she had installed an electric generator. Clemens agreed that if an electric generator had been installed, a plumbing

system could also have been set up in the cottage. Without electricity and plumbing, however, the cottage did not meet the Minimum Standards of Fitness for Human Habitation promulgated by the Massachusetts Department of Public Health on March 8, 1955 and the Provincetown Health Department Regulations adopted on July 15, 1957. See Exhibit A (Massachusetts minimum standards require "safe and adequate supply" of piped-in water, working kitchen sink, lavatory, and bath tub connected to both hot and cold water, and sewer systems); see also Exhibit B (Provincetown regulations require approved septic systems, piped-in water supply, adequate number of water closets, lavatory, bath tub, kitchen sink, and compliance with Massachusetts Minimum Standards). Also, there is no

indication that Bessay or her predecessors in title sought to comply with such minimum standards by obtaining the appropriate exemptions from the local health authorities. This court is therefore constrained by precedent to hold that the "Whatdoicare" cottage is not "improved property" within the meaning of the Cape Cod National Seashore Act.

Bessay also has failed to show that the land and cottage were held in the same ownership as of September 1, 1959. Bessay's predecessor in title, Dorothy Fearing, purchased the cottage from Ann Kleinman on November 25, 1939. Kleinman, in turn, had purchased the property from Raymond Brown. At the first trial, the court of appeals noted that "[t]here is no evidence of the character of possession of Kleinman, or

of her apparent predecessor, Raymond Brown." United States v. Certain Land Located in the County of Barnstable, 674 F.2d at 95. At the second trial before this court, Bessay again failed to present evidence of the use of this land by Kleinman and Brown. Assuming that the first instance of adverse use occurred when Fearing purchased the cottage in November 1939, and not when she refused to pay rent on the cottage to the Beede family in 1941, ownership still did not vest in Fearing as of September 1, 1959 because twenty years of adverse use had yet to accrue.

Bessay argues that the court should focus on prior possession as opposed to title acquired by adverse possession. While this court recognizes that even squatters have certain possessory rights, the wording of the Seashore Act

is phrased in terms of "ownership," not possession. In the instant case, Bessay has failed to establish that the land and cottage were held in the same ownership as of September 1, 1959 because none of her predecessors in title had adversely possessed the land for twenty years by that time.

In summary, this court finds 1) that the deed measurements, not the monument, control the distance of the northerly boundary line of the Beede Group property, 2) that Tract No. 8-P-1036 contains 224.3 acres, 3) that of the 224.3 acres, Bessay owns 8.17 acres by adverse possession and the Beede Group owns the remaining 216.23 acres, which acreage represents 3.6% and 96.4% of the land in Tract No. 8-P-1036 respectively, and 4) that the cottage owned by Grace Bessay does not

constitute "improved property" under the Cape Cod National Seashore Act and is therefore subject to condemnation by the government.

Accordingly, the court orders that 3.6% of the money on deposit in the First National Bank of Boston be withdrawn and paid over to Grace Bessay and that 96.4% of the money on deposit in the First National Bank of Boston be withdrawn and paid over to the Beede Group.

SO ORDERED.

/s/
David S. Nelson
United States District Court Judge

16 U.S.C. § 459b (1961, as amended 1986)

§ 459b. Cape Cod National Seashore; description of area

(a) The area comprising that portion of the land and waters located in the towns of Provincetown, Truro, Wellfleet, Eastham, Orleans, and Chatham in the Commonwealth of Massachusetts, and described in subsection (b) of this section, is designated for establishment as Cape Cod National Seashore (hereinafter referred to as "the seashore").

(b) The area referred to in subsection (a) of this section is desribed as follows: [Boundary description omitted.]

§ 459b-1. Acquisition of property

(a) Authority of Secretary; manner and place; concurrence of State owner; transfer from Federal agency to administrative jurisdiction of Secretary

The Secretary of the Interior (hereinafter referred to as "Secretary") is authorized to acquire by purchase, gift, condemnation, transfer from any Federal agency, exchange, or otherwise, the land, waters, and other property, and improvements thereon and any interest therein, within the area which is described in section 459b of this title or which lies within the boundaries of the seashore as described pursuant to section 459b-2 of this title (both together hereinafter in sections 459b to 459b-8 of this title referred to as "such area"). Any property, or interest therein, owned by the Commonwealth of Massachusetts, by any of the towns referred to in section 459b of this title, or by any other political subdivision of said Commonwealth may be acquired only with the concurrence of

such owner. Notwithstanding any other provision of law, any Federal property located within such area may, with the concurrence of the agency having custody thereof, be transferred without consideration to the administrative jurisdiction of the Secretary for use by him in carrying out the provisions of sections 459b to 459b-8 of this title.

(b) Use of funds; fair market value

The Secretary is authorized (1) to use donated and appropriated funds in making acquisitions under sections 459b to 459b-8 of this title, and (2) to pay therefor not more than the fair market value of any acquisitions which he makes by purchase under sections 459b to 459b-8 of this title.

(c) Exchange of property; cash equalization payments; reports to Congress

In exercising his authority to

acquire property by exchange, the Secretary may accept title to any non-Federal property located within such area and convey to the grantor of such property any federally owned property under the jurisdiction of the Secretary within such area. The properties so exchanged shall be approximately equal in fair market value: *Provided,* That the Secretary may accept cash from or pay cash to the grantor in such an exchange in order to equalize the values of the properties exchanged.

The Secretary shall report to the Congress on every exchange carried out under authority of sections 459b to 459b-8 of this title within thirty days from its consummation, and each such report shall include a statement of the fair market values of the properties involved and of any cash equalization

payment made or received.

(d) "Fair market value" defined; appraisal

As used in sections 459b to 459b-8 of this title the term "fair market value" shall mean the fair market value as determined by the Secretary, who may in his discretion base his determination on an independent appraisal obtained by him.

(Pub. L. 87-126 § 2, Aug. 7, 1961, 75 Stat. 287.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-2 to 459b-8 of this title.

§ 459b-2. Establishment

(a) Notice in Federal Register

As soon as practicable after August 7, 1961, and following the acquisition

by the Secretary of an acreage in the area described in section 459b of this title that its in the opinion of the Secretary efficiently administrable to carry out the purposes of sections 459b to 459b-8 of this title, the Secretary shall establish Cape Cod National Seashore by the publication of notice thereof in the Federal Register.

(b) Distribution of notice and map

Such notice referred to in subsection (a) of this section shall contain a detailed description of the boundaries of the seashore which shall encompass an area as nearly as practicable identical to the area described in section 459b of this title. The Secretary shall forthwith after the date of publication of such notice in the Federal Register (1) send a copy of such notice, together with a map showing

such boundaries, by registered or certified mail to the Governor of the Commonwealth of Massachusetts and to the board of selectmen of each of the towns referred to in section 459b of this title; (2) cause a copy of such notice and map to be published in one or more newspapers which circulate in each of such towns; and (3) cause a certified copy of such notice, a copy of such map, and a copy of sections 459b to 459b-8 of this title to be recorded at the registry of deeds for Barnstable County, Massachusetts.

(Pub. L. 87-126, § 3, Aug. 7, 1961, 75 Stat. 288.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1, 459b-3 to 459b-8 of this title.

§ 459b-3. Acquisition by condemnation

(a) Right of use and occupancy for residential purposes for life or fixed term of years; exercise of right of election; impairment of interests of lien-holders, etc.; right as running with land; transfer, assignment and termination of right; computation of compensation

(1) The beneficial owner or owners, not being a corporation, of a freehold interest in improved property which the Secretary acquires by condemnation may elect, as a condition to such acquisition, to retain the right of use and occupancy of the said property for noncommercial residential purposes for a term of twenty-five years, or for such lesser time as the said owner or owners may elect at the time of such acquisition.

(2) The beneficial owner or owners, not being a corporation, of a freehold

estate in improved property which property the Secretary acquires by condemnation, who held, on September 1, 1959, with respect to such property, an estate of the same nature and quality, may elect, as an alternative and not in addition to whatever right of election he or they might have under paragraph (1) of this subsection, to retain the right of use and occupancy of the said property for noncommercial residential purposes (i) for a term limited by the nature and quality of his or their said estate, if his or their said estate is a life estate or an estate pur auter vie, or (ii) for a term ending at the death of such owner or owners, or at the death of the survivor of them, if his or their said estate is an estate of fee simple.

(3) Where such property is held by a natural person or persons for his or

their own life or lives or for the life or lives of another or others (such person or persons being hereinafter called "the life tenant"), with remainder in another or others, any right of election provided for in paragraph (2) of this subsection shall be exercised by the life tenant, and any right of election provided for in paragraph (1) of this subsection shall be exercised by the concurrence of the life tenant and the remainderman or remaindermen.

(4) The beneficial owner or owners of a term of years in improved property which the Secretary acquires by condemnation may elect, as a condition to such acquisition, to retain the right of use and occupancy of the said property for noncommercial residential purposes for a term not to exceed the

remainder of his or their said term of years, or a term of twenty-five years, whichever shall be the lesser. The owner or owners of the freehold estate or estates in such property may, subject to the right provided for in the preceding sentence, exercise such right or rights of election as remain to them under paragraphs (1) and (2) of this subsection.

(5) No right of election accorded by paragraphs (1), (2), or (4) of this subsection shall be exercised to impair substantially the interests of holders of encumbrances, liens, assessments, or other charges upon or against the property.

(6) Any right or rights of use and occupancy retained pursuant to paragraphs (1), (2), and (4) of this subsection shall be held to run with the

land, and may be freely transferred and assigned.

(7) In any case where a right of use and occupancy for life or for a fixed term of years is retained as provided in paragraph (1), (2), or (4) of this subsection, the compensation paid by the Secretary for the property shall not exceed the fair market value of the property on the date of its acquisition by the Secretary, less the fair market value on such date of the said right retained.

(8) The Secretary shall have authority to terminate any right of use and occupancy of property, retained as provided in paragraph (1), (2), or (4) of this subsection, at any time after the date when any use occurs with respect to such property which fails to conform or is in any manner opposed to

or inconsistent with any applicable standard contained in regulations issued pursuant to section 459b-4 of this title and in effect on said date: *Provided,* That no use which is in conformity with the provisions of a zoning bylaw approved in accordance with said section 459b-4 which is in force and applicable to such property shall be held to fail to conform or be opposed to or inconsistent with any such standard. In the event that the Secretary exercises the authority conferred by this paragraph, he shall pay to the owner of the right so terminated an amount equal to the fair market value of the portion of said right which remained on the date of termination.

(b) Suspension of authority for one year and during existence of zoning regulations

(1) The Secretary's authority to

acquire property by condemnation shall be suspended with respect to all improved property located within such area in all of the towns referred to in section 459b of this title for one year following August 7, 1961.

(2) Thereafter such authority shall be suspended with respect to all improved property located within such area in any one of such towns during all times when such town shall have in force and applicable to such property a duly adopted, valid zoning bylaw approved by the Secretary in accordance with the provisions of section 459b-4 of this title.

(c) Suspension of authority respecting property used for commercial or industrial purposes

The Secretary's authority to acquire property by condemnation shall be suspended with respect to any

particular property which is used for commercial or industrial purposes during any periods when such use is permitted by the Secretary and during the pendency of the first application for such permission made to the Secretary after August 7, 1961 provided such application is made not later than the date of establishment of the seashore.

(d) "Improved property" defined

The term "improved property," wherever used in sections 459b to 459b-8 of this title, shall mean a detached, one-family dwelling the construction of which was begun before September 1, 1959 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for

the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated. The amount of the land so designated shall in every case be at least three acres in area, or all of such lesser amount as may be held in the same ownership as the dwelling, and in making such designation the Secretary shall take into account the manner of noncommercial residential use in which the dwelling and land have customarily been enjoyed: *Provided, however,* That the Secretary may exclude from the land so designated any beach or waters, together with so much of the land adjoining such beach or waters as the Secretary may deem necessary for public access thereto.

(e) Acquisition of clear, marketable and encumbrance-free title

Nothing in this section or elsewhere in sections 459b to 459b-8 of this title shall be construed to prohibit the use of condemnation as a means of acquiring a clear and marketable title, free of any and all encumbrances.

(Pub. L. 87-126, § 4, Aug. 7, 1961, 75 Stat. 288.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1, 459b-2, 459b-4 to 459b-8 of this title.

§ 459b-4. Zoning regulations

(a) Standards for approval; submission to Congress and municipalities; publication in Federal Register; approval of local bylaws; revocation of approval

As soon after August 7, 1961, as

may be practicable, the Secretary shall issue regulations specifying standards for approval by him of zoning bylaws for purposes of section 459b-3 of this title. The Secretary may issue amended regulations specifying standards for approval by him of zoning bylaws whenever he shall consider such amended regulations to be desirable due to changed or unforeseen conditions.

All regulations and amended regulations proposed to be issued under authority of the two preceding sentences of this subsection shall be submitted to the Congress and to the towns named in section 459b of this title at least ninety calendar days (which ninety days, however, shall not include days on which either the House of Representatives or the Senate is not in session because of an adjournment of more than three

calendar days to a day certain) before they become effective and the Secretary shall, before promulgating any such proposed regulations or amended regulations in final form, take due account of any suggestions for their modification which he may receive during said ninety-day period. All such regulations and amended regulations shall, both in their proposed form and in their final form, be published in the Federal Register.

The Secretary shall approve any zoning bylaw and any amendment to any approved zoning bylaws submitted to him which conforms to the standards contained in the regulations in effect at the time of the adoption by the town of such bylaw or such amendment unless before the time of adoption he has submitted to the Congress and the towns

and published in the Federal Register as aforesaid proposed amended regulations with which the bylaw or amendment would not be in conformity, in which case he may withhold his approval pending completion of the review and final publication provided for in this subsection and shall thereafter approve the bylaw or amendment only if it is in conformity with the amended regulations in their final form. Such approval shall not be withdrawn or revoked, nor shall its effect be altered for purposes of section 459b-3 of this title by issuance of any such amended regulations after the date of such approval, so long as such bylaw or such amendment remains in effect as approved.

(b) Commercial and industrial use prohibition; acreage, frontage, setback and miscellaneous requirements

The standards specified in such

regulations and amended regulations for approval of any zoning bylaw or zoning bylaw amendment shall contribute to the effect of (1) prohibiting the commercial and industrial use, other than any commercial or industrial use which is permitted by the Secretary, of all property within the boundaries of the seashore which is situated within the town adopting such bylaw; and (2) promoting the preservation and development, in accordance with the purposes of sections 459b to 459b-8 of this title, of the area comprising the seashore, by means of acreage, frontage, and setback requirements and other provisions which may be required by such regulations to be included in a zoning bylaw consistent with the laws of Massachusetts.

(c) Adverse provisions and absence of notice for variance as requiring

disapproval of local bylaws

No zoning bylaw or amendment of a zoning bylaw shall be approved by the Secretary which (1) contains any provision which he may consider adverse to the preservation and development, in accordance with the purposes of sections 459b to 459b-8 of this title, of the area comprising the seashore, or (2) fails to have the effect of providing that the Secretary shall receive notice of any variance granted under and any exception made to the application of such bylaw or amendment.

(d) Termination of suspension of authority for acquisition by condemnation because of nonconforming variances and uses; agreements concerning exercise of authority

If any improved property with respect to which the Secretary's authority to acquire by condemnation has been suspended by reason of the adoption

and approval, in accordance with the foregoing provisions of this section, of a zoning bylaw applicable to such property (hereinafter referred to as "such bylaw") - (1) is made the subject of a variance under or an exception to such bylaw, which variance or exception fails to conform or is in any manner opposed to or inconsistent with any applicable standard contained in the regulations issued pursuant to this section and in effect at the time of the passage of such bylaw, or

(2) is property upon or with respect to which there occurs any use, commencing after the date of the publication by the Secretary of such regulations, which fails to conform or is in any manner opposed to or inconsistent with any applicable standard contained in such regulations (but no use which is in

conformity with the provisions of such bylaw shall be held to fail to conform or be opposed to or inconsistent with any such standard).

The Secretary may, at any time and in his discretion, terminate the suspension of his authority to acquire such improved property by condemnation: *Provided, however,* That the Secretary may agree with the owner or owners of such property to refrain from the exercise of the said authority during such time and upon such terms and conditions as the Secretary may deem to be in the best interests of the development and preservation of the seashore.

(Pub. L. 87-126, § 5, Aug. 7, 1961, 75 Stat. 290.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1 to 459b-3, 459b-5 to 459b-8 of this title.

§ 459b-5. Certificate of suspension of authority for acquisition by condemnation

The Secretary shall furnish to any party in interest requesting the same, a certificate indicating, with respect to any property located within the seashore as to which the Secretary's authority to acquire such property by condemnation has been suspended in accordance with the provisions of sections 459b to 459b-8 of this title, that such authority has been so suspended and the reasons therefor.

(Pub. L. 87-126, § 6, Aug. 7, 1961, 75 Stat. 291.)

SECCTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1 to 459b-4, 459b-6 to 459b-8 of this title.

§ 459b-6. Administration of acquired property

(a) Utilization of authority for conservation and management of natural resources

Except as otherwise provided in sections 459b to 459b-8 of this title, the property acquired by the Secretary under such sections shall be administered by the Secretary subject to the provisions of sections 1 and 2 to 4 of this title, as amended and supplemented, and in accordance with laws of general application relating to the national park system as defined by sections 1b to 1d of this title; except that authority otherwise available to the Secretary for the conservation and

management of natural resources may be utilized to the extent he finds such authority will further the purposes of sections 459b to 459b-8 of this title.

(b) Preservation of seashore; incompatible visitor conveniences restricted; provisions for public enjoyment and understanding; developments for recreational activities; public use areas

(1) In order that the seashore shall be permanently preserved in its present state, no development or plan for the convenience of visitors shall be undertaken therein which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing or with the preservation of such historic sites and structures as the Secretary may designate: *Provided,* That the Secretary may provide for the public enjoyment and understanding of the unique natural, historic, and scientific

features of Cape Cod within the seashore by establishing such trails, observation points, and exhibits and providing such services as he may deem desirable for such public enjoyment and understanding: *Provided further*, That the Secretary may develop for appropriate public uses such portions of the seashore as he deems especially adaptable for camping, swimming, boating, sailing, hunting, fishing, the appreciation of historic sites and structures and natural features of Cape Cod, and other activities of similar nature.

(2) In developing the seashore the Secretary shall provide public use areas in such places and manner as he determines will not diminish for its owners or occupants the value or enjoyment of any improved property located within the seashore.

(c) Hunting and fishing regulations; navigation

The Secretary may permit hunting and fishing, including shellfishing, on lands and waters under his jurisdiction within the seashore in such areas and under such regulations as he may prescribe during open seasons prescribed by applicable local, State and Federal law. The Secretary shall consult with officials of the Commonwealth of Massachusetts and any political subdivision thereof who have jurisdiction of hunting and fishing, including shellfishing, prior to the issuance of any such regulations, and the Secretary is authorized to enter into cooperative arrangements with such officials regarding such hunting and fishing, including shellfishing, as he may deem desirable, except that the Secretary shall leave all aspects of

the propagation and taking of shellfish to the towns referred to in section 459b of this title.

The Secretary shall not interfere with navigation of waters within the boundaries of the Cape Cod National Seashore by such means and in such areas as is now customary.

(Pub. L. 87-126 § 7, August. 7, 1961, 75 Stat. 291.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1 to 459b-5, 459b-7, 459b-8 of this title.

§ 459b-7. Cape Cod National Seashore Advisory Commission

(a) Establishment; termination

There is established a Cape Cod National Seashore Advisory Commission (hereinafter referred to as the

"Commission"). Said Commission shall terminate 30 years after the date the seashore is established under section 459b-2 of this title.

(b) Membership; term

The Commission shall be composed of ten members each appointed for a term of two years by the Secretary as follows:

(1) Six members to be appointed from recommendations made by each of the boards of selectmen of the towns referred to in section 459b of this title, one member from the recommendations made by each such board;

(2) One member to be appointed from recommendations of the county commissioners of Barnstable County, Commonwealth of Massachusetts;

(3) Two members to be appointed from recommendations of the Governor of the Commonwealth of Massachusetts; and

(4) One member to be designated by the Secretary.

(c) Chairman; vacancies

The Secretary shall designate one member to be Chairman. Any vacancy in the Commission shall be filled in the same manner in which the original appointment was made.

(d) Compensation and expenses

A member of the Commission shall serve without compensation as such. The Secretary is authorized to pay the expenses reasonably incurred by the Commission in carrying out its responsibilities under sections 459b to 459b-8 of this title upon vouchers signed by the Chairman.

(e) Majority vote

The Commission established by this section shall act and advise by affirmative vote of a majority of the

members thereof.

(f) Consultation of Secretary with Commission

The Secretary or his designee shall, from time to time, consult with the members of the Commission with respect to matters relating to the development of Cape Cod National Seashore and shall consult with the members with respect to carrying out the provisions of sections 459b-3 and 459b-4 of this title.

(g) Advice of Commission for commercial or industrial use permits and establishment of public use areas for recreational activities

No permit for the commercial or industrial use of property located within the seashore shall be issued by the Secretary, nor shall any public use area for recreational activity be established by the Secretary within the seashore, without the advice of the

Commission, if such advice is submitted within a reasonable time after it is sought.

(h) Exemption from other provisions of law

(1) Any member of the Advisory Commission appointed under sections 459b to 459b-8 of this title shall be exempted, with respect to such appointment, from the operation of sections 281, 283, 284, and 1914 of title 18 and section 190 of the Revised Statutes (5 U.S.C. 99)[1] except as otherwise specified in paragraph (2) of this subsection.

(2) The exemption granted by paragraph (1) of this subsection shall not extend

(i) to the receipt or payment of salary in connection with the appointee's Government service

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[1] See References in Text note below.

from any sources other than the private employer of the appointee at the time of his appointment; or (ii) during the period of such appointment, and the further period of two years after the termination thereof, to the prosecution or participation in the prosecution, by any person so appointed, of any claim against the Government involving any matter concerning which the appointee had any responsibility arising out of his appointment during the period of such appointment.

(Pub. L. 87-126, § 8, Aug. 7, 1961, 75 Stat. 292; Pub. L. 99-420, title II, § 201, Sept. 25, 1986, 100 Stat. 960.)

REFERENCES IN TEXT

Sections 281, 283, 284, and 1914 of

title 18, referred to in subsec. (h)(1), were repealed by Pub. L. 87-849, § 2, Oct. 23, 1962, 76 Stat. 1126, "except as they [sections 281 and 283] may apply to retired officers of the armed forces of the United States", and were supplanted by sections 203, 205, 207, and 209, respectively, of Title 18, Crimes and Criminal Procedure. For further details, see Exemptions note set out under section 281 of Title 18.

Section 190 of the Revised Statutes (5 U.S.C. 99), referred to in subsec. (h)(1), was repealed by Pub. L. 87-849, § 3, Oct. 23, 1962, 76 Stat. 1126. See section 207 of Title 18.

AMENDMENTS

1986 - Subsec. (a). Pub. L. 99-420 substituted "30 years" for "ten years".

REESTABLISHMENT AND EXTENSION OF COMMISSION

Pub. L. 99-349, title I, July 2, 1986, 100 Stat. 731, provided: "That the Cape Cod National Seashore Advisory Commission established under section 8(a) of the Act of August 7, 1961 (Public Law 87-126; 75 Stat. 292) [16 U.S.C. 459b-7(a)] is reestablished and extended through February 28, 1996".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1 to 459b-6, 459b-8 of this title.

§ 459b-8. Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 459b to 459b-8 of this title;

except that no more than $42,917,575 shall be appropriated for the acquisition of land and waters and improvements thereon, and interests therein, and incidental costs relating thereto, in accordance with the provisions of such sections.

(Pub. L. 87-126, § 9, August 7, 1961, 75 Stat. 293; Pub. L. 91-252, May 14, 1970, 84 Stat. 216; Pub. L. 98-141, § 3, Oct. 31, 1983, 97 Stat. 909.)

AMENDMENTS

1983 - Pub. L. 98-141 substituted "$42,917,575" for "$33,500,000".

1970 - Pub. L. 91-252 substituted "$33,500,000" for $16,000,000".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 459b-1 to 459b-7 of this title.

PART 27 - CAPE COD NATIONAL SEASHORE; ZONING STANDARDS

Sec.

27.1 General objectives.
27.2 Commercial and industrial activities.
27.3 Seashore District.
27.4 Variances and exceptions.

AUTHORITY: Secs. 1, 5, 75 Stat. 284, 290; 16 U.S.C. 459b, 459b-4.

SOURCE: 27 FR 6714, July 14, 1962, unless otherwise noted.

§27.1 General objectives.

(a) Consistent with the objectives set out in section 5 of the Act of August 7, 1961 (75 Stat. 284), development and management of the Cape Cod National Seashore will be conducted in a manner which will assure the widest possible public use, understanding and enjoyment of its natural, cultural and scientific features. The regulations in this part are designed and promulgated

to establish minimum standards which local zoning bylaws must meet in furtherance of those purposes.

(b) The standards hereby established for approval of zoning bylaws or amendments of zoning bylaws are intended: (1) To contribute to the effect of prohibiting the commercial and industrial use, other than existing commercial or industrial use not inconsistent with the purposes of the Act of August 7, 1961 (75 Stat. 284, 291), of all property within the boundaries of the Cape Cod National Seashore and situated in the towns of Provincetown, Truro, Wellfleet, Eastham, Orleans and Chatham; and (2) to promote preservation and development, in accordance with the purposes of the said Act, of the area comprising the seashore, by means of acreage, frontage

and setback requirements and other provisions which may be required to be included in zoning bylaws consistent with the laws of Massachusetts. Zoning bylaws or amendments of zoning bylaws applicable to the area within Cape Cod National Seashore, in order that they may be approved, shall conform to the standards herein set forth relating to preservation and development of the seashore in accordance with the purposes of the said Act. The Secretary shall be given notice of any amendments to approved zoning bylaws that affect the Seashore District. Nothing in these standards or in the zoning bylaws adopted pursuant thereto for the area within Cape Cod National Seashore shall preclude the Secretary of the Interior from fulfilling the responsibilities vested in him by the Act of August 7,

1961, or by the Act of August 25, 1916 (39 Stat. 535), as amended and supplemented.

(c) Wherever the term "improved property" is used in this part it shall mean a detached, one-family dwelling, the land on which it is situated, and accessory structures, and as further defined in section 4(d) of the Act of August 7, 1961 (75 Stat. 284).

§27.2 Commercial and industrial activities.

No commercial or industrial districts may be established within the Cape Cod National Seashore.

§27.3 Seashore District.

(a) *Description.* The Seashore District shall include all those portions of the towns of Provincetown, Truro, Wellfleet, Eastham, Orleans and

Chatham lying within the exterior boundaries of the Cape Cod National Seashore.

(b) Zoning bylaws for the Seashore District shall be consistent with the objectives and purposes of the Act of August 7, 1961, so that - to the extent possible under Massachusetts law - the scenic, scientific and cultural values of the area will be protected, undeveloped areas will be preserved in a natural condition, and the distinctive Cape Cod character of existing residential structures will be maintained.

(c)(1) No moving, alteration, or enlargement of existing one-family residential dwellings or structures accessory thereto situated within this District shall be permitted if such would afford less than a 50-foot setback

from all streets measured at a right angle with the street line, and a 25-foot distance from the abutters' property lines (or less than such lesser setback or distance requirements already in existence for such dwellings or accessory structures).

(2) If through natural phenomena or causes a lot or lots are so diminished in size that an owner would be unable to comply with the setback or sideline requirements herein prescribed, such owner or the zoning authorities may, as provided in §27.4(b), request the Secretary of the Interior to determine whether a proposed move, reconstruction, alteration of [sic] enlargement of an existing residential dwelling or accessory structure would subject the property to acquisition by condemnation.

(d) Zoning bylaws adopted pursuant

to this regulation shall contain provisions designed to preserve the seashore character of the area by appropriate restrictions or prohibitions upon the burning of cover, cutting of timber, filling of land, removal of soil, loam, sand or gravel and dumping, storage, or piling of refuse and other unsightly objects or other uses which would detract from the natural or traditional seashore scene.

(e) Zoning bylaws for the Seashore District may permit residential uses of "improved property" and other uses of such dwellings and their accessory structures: *Provided*, Such other uses are traditional to these seashore communities, are customarily incidental to the principal residential use and do not alter the essential character of the dwelling and premises as a private

residence. Subject to those conditions such uses may include, but are not limited to: (1) Partial use of dwellings by residents for a professional office (as for the practice of theology, law or medicine), as an artists' studio, for appropriate small scale home occupations as the making and selling of traditional Cape Cod products produced on the premises, and for the rental of rooms and serving of meals by residents of the premises to overnight guests; (2) the existence of structures, such as a garage, barn or boathouse accessory to the dwelling; (3) display of a sign which may be indirectly but not directly illuminated and not to exceed two square feet in area, referring to the occupancy, sale, or rental of the premises; (4) traditional agricultural uses of cleared land, but not including

such objectionable uses as a piggery or the raising of livestock, poultry or fur-bearing animals for commercial purposes; and (5) the opening of shellfish, the storage and use of fishing equipment, and other traditional fishing activities. No commercial or industrial ventures (other than of the types described above), may be established within the Seashore District.

§27.4 Variances and exceptions.

(a) Zoning bylaws may provide for variances and exceptions.

(b) Bylaws adopted pursuant to these standards shall contain provisions which constitute notice to applicants for variances and exceptions that, under section 5(d) of the Act of August 7, 1961, the Secretary of the Interior is

authorized to withdraw the suspension of his authority to acquire, by condemnation, "improved property" that is made the subject of a variance or exception which, in his opinion, fails to conform or is in any manner opposed to or inconsistent with preservation and development of the seashore as contemplated in the said Act. The Secretary may be consulted at any time by zoning authorities or by the owner of "improved property" regarding the effect of a proposed variance or exception upon the status of the affected property with regard to the suspension of the Secretary's authority to condemn. The Secretary, within 60 days of the receipt of a request for such determination, or as soon thereafter as is reasonably possible, shall advise the owner or zoning authorities whether or

not the intended use will subject the property to acquisition by condemnation.

(c) The Secretary shall be promptly notified of the granting of any variance or exception.

UNITED STATES DEPARTMENT OF THE INTERIOR

National Park Service

P.O. Box 37127

Washington, D.C. 20013-7127

Memorandum

To: Regional Director,
North Atlantic Region

Through: Chief Historian,
NPS Federal Preservation
Officer

From: Chief of Registration,
National Register of
Historic Places

Re: Determination of Eligibility
for the Dune Shacks Cape Cod
National Seashore

Our evaluation of your request for a determination of eligibility for the dune shacks located within the boundaries of the Cape Cod National Seashore has been completed. The analysis of the property required careful consideration and research into all information submitted by you, the Massachusetts State Historic Preservation Officer, and other interested parties including members of Congress, the Provincetown Board of Selectmen, the Peaked Hill Trust, and the general public.

Attached is the determination of eligibility notification with supporting review comments which explain our conclusion that the Dune Shacks of Peaked Hill Bars Historic District is eligible for the National Register of Historic Places.

If we can provide further information or assistance, please let us know.

/s/ Carol D. Shull

Attachments

E.O. 11593
DETERMINATION OF ELIGIBILITY
NOTIFICATION
NATIONAL REGISTER OF HISTORIC PLACES
NATIONAL PARK SERVICE

Name of property: Dune Shacks of Peaked Hill Bars Historic District

Location: Cape Cod National Seashore

State: MA
Barnstable County

Request submitted by: Herbert S. Cables, Jr./NPS

Date Received: 2/3/89 **Additional information received:** 3/2/89; 3/7/89 4/17/89; 4/18/89; 5/1/89

Opinion of the State Historic Preservation Officer:

X Eligible **Not Eligible** **No Response**

Comments:

The Secretary of the Interior has determined that this property is:

X Eligible Applicable criteria:

A, B, C Not Eligible

Comments:

See attached comments.

Documentation insufficient (Please see accompanying sheet explaining additional materials required)

/s/ Carol D. Shull
Keeper of the National Register

Date: 5-12-89

NATIONAL PARK SERVICE
INTERAGENCY RESOURCES DIVISION
NATIONAL REGISTER OF HISTORIC PLACES
REVIEW COMMENTS
DUNE SHACKS, CAPE COD NATIONAL SEASHORE, MA

SIGNIFICANCE:

The dune shacks and the dune landscape surrounding them are eligible for the National Register as a historic district under criteria A and C because of their exceptionally significant associations with the historic development of American art, literature and theater; and for their representation of a rare, fragile property type. Additionally, the Tasha Cottage and the district are significant for historic associations with the productive life of poet Harry Kemp under criterion B. The dune shacks and the dunes themselves represent a historic cultural landscape comprised of a distinctive, significant concentration of natural and cultural resources united by their shared historic use as a summer retreat for the Provincetown colony of artists, writers, poets, actors and others. The importance of the dune shacks is embodied in their collective association with the historical development of the arts; their spartan, utilitarian form; and their unique relationship with the harsh dune environment.

The dune landscape, as the source of natural beauty and artistic inspiration, is the linchpin of the district's cultural importance: it provides the key to the district's

existence and to its fragile historic character. The shacks are the surviving material artifacts that convey the significant, continued historic use of the dunes' seaside setting over time. Because of the continuous shifting conditions of the dunes and the problem of erosion, some of the dune shacks have been moved short distances to ensure their preservation. Because the shacks are part of a district and because of the expected impact of the harsh dune environment, their movement within the same general environment is acceptable and does not detract from the district's eligibility.

The dune shacks provided shelter while minimally intruding into the contemplative solitude of the environment that provided the impetus to an abundance of artistic and literary work. The shacks' unpretentious, predominantly one-room structure, their simple materials and craftsmanship, their mobility, and their lack of amenities such as electricity and running water enabled their inhabitants to experience a survivalist relationship with nature. Celebration of the Cape's natural environmental qualities is eloquently embodied in Thoreau's Cape Cod (1865) and Henry Beston's The Outermost House (1928). This same attitude was perpetuated by the inhabitants of the dune shacks as attested to in the oral history contained in Josephine Del Deo's account of "The Dune Cottages at Peaked Hill Bars" and in the multitude of letters from a variety of literary figures such as Edmund Wilson, Norman

Mailer, Jack Kerouac, Hazel Hawthorne Werner, artists, historians, numerous long-time residents, members of Congress, the Provincetown Board of Selectmen, and other interested parties advocating the preservation of the dune shacks.

Although the proposed Provincetown Historic District and other individual buildings in the town are historically related to Provincetown's development as a late 19th and 20th-century art and literary colony and to particular significant individuals, the dunes and the dune shacks represent the isolated seaside hinterland which also served as an important retreat for inspiration and the creation of artistic and literary work by members of that same community. Art schools such as the Cape Cod School of Art, established in 1899 by Charles Hawthorne, and the Summer School of Painting, established in 1900 by Ambrose Webster, as well as other organizations such as the Provincetown Players (1916), the Beachcombers Club (1916), and the Sixes and Sevens Coffeehouse (1920), were drawn to the Cape's natural beauty and the promotion of the arts in Provincetown. Major luminaries such as playwright Eugene O'Neill, socialite Mabel Dodge, and radical journalist John Reed attracted an everchanging constellation of literati, socialites, bohemians, actors, writers, and artists to the dunes at Provincetown for artistic inspiration and creative interaction.

Eugene O'Neill is one of the well-known writers clearly associated with the

dunes. In his work diaries archived in manuscript collections at Yale University, O'Neill lists dates and places where plays were written including works penned at the dunes at Peaked Hill: Anna Christie (1920), The Emperor Jones (1920), Diff'rent (1920), The Fountain (1921), The Hairy Ape (1921), Marco Millions (1923), and All God's Chillun Got Wings (1923). Despite the destruction of the old lifesaving station associated with Eugene O'Neill in the 1931 hurricane, the cultural tradition of dune habitation has been continued by subsequent generations of creative persons. Following the destruction of the O'Neill property several shacks were constructed in the 1930s, 40s and 50s to meet the demand for dune living accommodations.

Although it may not be possible to document direct association of well-known figures with each individual shack, sources do document the long association of the artistic community with the district and with the dune shacks from O'Neill's occupation to the present. Critic Edmund Wilson's The Thirties chronicles his visits to the dunes and to the abode of Eugene O'Neill, the abandoned lifesaving station previously converted to a residence by socialite Mabel Dodge. The book, transcribed from Wilson's journals, provides anecdotes about the impact of the seaside environment and mentions several individuals who shared the experience of life in a stark dune shack by the sea. It is clear from this account and others that the dunes and the dune shacks, as the sole remaining

material cultural artifacts representative of this pattern of historical use and cultural symbolism, were frequented not by isolated individuals, but rather by a collection of varied artists united by the dynamic process of artistic creation. Some persons mentioned specifically in Wilson's accounts are: John Dos Passos and his wife, Katy; George Cram Cook and Susan Glaspell, founders of the Provincetown Players; bohemian poet Harry Kemp; artist Niles Spencer; watercolorists William and Lucy L'Engle; writer Mary Heaton Vorse; local bookseller Frank Shay, publisher of early O'Neill, Edna Millay, and Susan Glaspell works; and Hazel Hawthorne Ufford (later to become Werner), relative of artist Charles Hawthorne and one of the grand dames of the dunes.

Hazel Hawthorne Werner's novel The Salt House was written and published while she was in residence on the dunes in the 1930s. The circle of literary and artist friends who frequented her two dune shacks, Thalassa and Euphoria, included Wilson, Glaspell, Dos Passos, e.e. cummings, Clare Leighton, Edwin Dickinson, Franz Kline, and Jack Kerouac, among others.

William Brevda's biography of poet Harry Kemp entitled Harry Kemp: The Last Bohemian (1986) documents the poet's intensely personal relationship with the dune environment throughout his life. Kemp, known as the "Poet of the Dunes," wove references to the dunes throughout his poetry and other writings created primarily while he was in residence at

the dunes. Numerous references can be found in the texts of such works as Love Among the Cape Enders, Tramping on Life, More Miles, "Great Night," "Poet's Song," "Aurian Dunes," "Dune-Revenant," Poet of the Dunes: Songs of the Dunes and the Outer Shore, With Others in Varying Modes and Moods, and his unpublished autobiographical novel, "Time of the Moon: A Tale of the Dunes," to name but a few of his works. Kemp felt such an affinity for the dunes and his experiences there that he specifically requested that upon his death that half of his ashes be scattered over the dunes and the other half be scattered over Greenwich Village. Writer, artist, poet Jan Gelb, spent most of her summers in a dune shack built by her husband, artist Boris Margo, conceiving and executing works from 1935 until her death in 1977. She too had her ashes scattered among the dunes.

The period of significance for the Dune Shacks extends to the less than fifty year period, but the district meets criteria exception G for exceptional significance. Documentation supports their exceptional importance as a unique resource type associated with long-standing traditional use by American and expatriate European artists, poets, journalists, celebrated bohemians, socialites and the like. A logical termination date for the district's period of significance is 1960. The rationale is twofold: in 1960 the Cape Cod National Seashore was created, and the year also marks the date of Harry Kemp's death in the dunes. It may be

true that not enough time has passed to allow for a historical perspective on the significant achievements of some individual artists associated with the district in the less than fifty year period. However, there does exist sufficient documentation on the importance of the district to Provincetown's history as a haven for the artistic community and the role of this group of artists and their work, both in Provincetown and the dunes, to demonstrate the shacks' exceptional cultural significance for associations with the continued use of the district by recognized artists under criterion A.

The essay on the history of the Provincetown art colony by Dorothy Gees Seckler provided in Provincetown Painters: 1890s-1970s (1977), edited by Ronald A. Kuchta, documents this broad pattern of historical development within the context of a handful of comparable art colonies in Europe and the United States. The appendix of this book lists numerous artists who have painted in the Provincetown vicinity, as documented by a variety of sources including books, periodicals, museum records and oral history. Of the 283 artists listed, the vast majority worked in the Provincetown area in the 1920s, 30s, 40s and 50s. They run the gamut from relative unknowns to well-known artists and include such names as: Blanche Lazell, Bruce McKain, John Grillo, Philip Malicoat, Ross Moffett, Frederick J. Waugh, Ben Shahn, Jan Muller, Marcia Marcus, and Marguerite and William Zorach, to name but a few. Specific dune shacks are linked with several of these

individual artists; however, the district is significant for the shacks' collective use by the artistic community. Representative paintings illustrating the direct influence of the dunes and the shacks include: "The Shack" by Loren MacIver (1934), "Dunes at Sunset" by Morris Kantor (1939), and "Cabin Behind Herman Tasha's" by Wolf Kahn (1953).

BOUNDARY:
The boundary for the Dune Shacks at Peaked Hill Bars Historic District encompasses approximately 1500 acres and is described as: the shoreline to the north, the crest of the second dune line away from the shore south of the second jeep trail delineated on the accompanying USGS map, the viewshed line of the cluster of shacks F, A, I and D on the west, and the crest of the first dune ridge to the east of shack B. These boundaries are demarcated on the attached map of the area.

This boundary encompasses all of the dune shacks and the area incorporating the entirety of the historically significant cultural landscape and associated important viewsheds as seen from the dune shacks. This boundary is supported by the written documentation and by the attached Geographic Information Systems viewshed analysis. We recognize the shifting characteristics of the dune landscape; for this reason, this boundary is a close approximation. In light of dune movement the boundary may move in some locations some degree, but the basic principles underlying its justification

shall remain constant. Allowing for this movement, the boundary shall continue to include the dune shacks and the extent of the landscape to the crest of the second dune ridge, wherever that may occur.

Prepared by: Beth L. Savage
Architectural Historian
May 1989

McGregor, Shea & Doliner
18 Tremont Street, Suite 900
Boston, MA 02108

May 18, 1989

Clerk, United States Court of Appeals
16th Floor
John W. McCormack Post Office and
Courthouse
Ten Post Office Square
Boston, MA 02108

RE: United States of America v. Certain Land Located in County of Barnstable, Commonwealth of Massachusetts, E. Bennett Beede, et al. Defendants, Appellees

Grace E. Bessay
Defendant, Appellant
No. 88-2029

Determination of Eligibility for Ms. Bessay's Dune Cottage by the Keeper of the National Register of Historic Places

Dear Mr. Scigliano:

Please bring this letter and the enclosed copy of the Determination of Eligibility Notification to the attention of Judges Re, Bownes, and Torruella, who heard arguments on this case Thursday, May 4, 1989. The Determination by the Keeper of the National Register of Historic Places, which is accompanied by a statement

describing the historical significance of the "Dune Shacks of Peaked Hill Bars Historic District," is relevant to a question raised at oral argument. This matter is also addressed in Bessay's Brief at Pages 15-21, the U.S.A.'s Brief at Pages 13-14, and Bessay's Reply Brief at Pages 9-10.

Thank you for your attention to this matter.

Respectfully yours,

/s/
Jeffrey B. Axelrod

JBA/kl
Encl.
cc: David C. Shilton, Esq.
Nicholas C. Theodorou, Esq.
J. Robin Lepore, Esq.
William P. Homans, Jr., Esq.
Grace E. Bessay

Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1347

In The

Supreme Court of the United States

October Term, 1989

GRACE E. BESSAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND NATIONAL INHOLDERS ASSOCIATION & MULTIPLE-USE LAND ALLIANCE IN SUPPORT OF PETITIONER

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No. 89-1347

In The

Supreme Court of the United States

October Term, 1989

GRACE E. BESSAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND NATIONAL INHOLDERS ASSOCIATION & MULTIPLE-USE LAND ALLIANCE IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) and National Inholders Association & Multiple-Use Land Alliance (NIA) respectfully submit this brief *amici curiae* in support of Ms. Grace E. Bessay, the Petitioner for *certiorari*.[1]

[1] *Amici* have obtained the written consent of the parties to the action below, pursuant to Rule 37.2 of the Supreme Court Rules.

INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation is a non profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. Mountain States Legal Foundation has an extensive background and expertise in public land law, particularly as it relates to the activities of the Department of the Interior, including the National Park Service. The nearly 3,000 members of Mountain States Legal Foundation – from every state in the Union – are vitally interested in ensuring the protection of private property from illegal appropriation by the United States Government.

National Inholders Association & Multiple-Use Land Alliance has over 15,000 members in all 50 states. NIA represents over 1.2 million people who own land or some type of equity interest within the boundaries of federally managed areas – managed variously by the National Park Service, the Fish and Wildlife Service, the Bureau of Land Management, the Corps of Engineers, and the U.S. Forest Service – or who are impacted by the management and regulation of, or access to, those areas. With offices in Concord, Massachusetts; Cascade Locks, Oregon; Battle Ground, Washington; and Sonoma, California; NIA has acted as a consultant to private citizens as well as cities, counties and states concerned about protecting the rights and property of their residents from excessive federal land acquisition and regulation.

Each of America's small communities fears for the basic economic fabric of its community. As more and more land is purchased by the U.S. Government, the tax base shrinks, funds for roads, schools and community support services become more scarce and the economic burden is shifted to other landowners, causing additional hardship, relocation and erosion of the quality of life.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case. However, *amici* make the following statement by way of simplification and clarification.

In 1961, the United States Congress adopted into law The Cape Cod National Seashore Act. In the extensive legislative history that accompanied adoption of that statute, Congress made it clear that it sought to preserve not just the windswept shore, but the weathered shacks that dot the dunes of Cape Code. Both are part of the harsh, austere, and Spartan scene that so characterizes the Cape Code seashore.[2]

In order to ensure that the owners of those cottages would be permitted to remain free of the eminent domain powers of the National Park Service – acting for the Secretary of the Interior – Congress wrote the "improved property" exemption into the Act. Except for a requirement that each of the six towns in which cottages were located adopt zoning by-laws consistent with regulations adopted by the Secretary of the Interior, there was no other requirement to be free from the threat of condemnation. All that was necessary was that a cottage meet the

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[2] The legislative history is clear on this subject:

> Lower Cape Cod cannot be considered solely as a geographical area with certain physical characteristics. The Lower Cape must also be viewed as a way of life – a culture – which though conditioned by its environment finds its essence in the people who have lived and are living there. This bill seeks to preserve the way of life which these people have established and maintained on the Cape.

S. Rep. No. 428, 87th Cong., 1st Sess. 19, *reprinted in* 1961 *U.S. Code Cong. & Ad. News* 2212, 2227.

Ms. Bessay's cottage is clearly one of the rustic dwellings meant to be preserved by Congress, since her cottage is one of 18 structures determined by the Keeper of the National Register of Historic Places, National Park Service, to be eligible for the National Register as an historic district.

definition of "improved property" included in the Act itself. That definition could not have been more simple: "a detached, one-family dwelling the construction of which was begun before September 1, 1959. . . ."[3]

Notwithstanding that extensive legislative history, and the use of a word – to wit: "dwelling" – which means simply "a building or other shelter in which people live,"[4] the National Park Service ignored the intent of Congress, as expressed in the Act and the legislative history, and subverted the definition of the word "dwelling" in order to condemn the property of petitioner. For the National Park Service – and for no one else in this country – "dwelling" means not simply "a building or other shelter in which people live," but "a building or other shelter – *with* indoor plumbing and electricity – in which people live." Having so defined "dwelling," and having demonstrated that petitioner's property did not have indoor plumbing or electricity, the National Park Service then invoked the power of eminent domain against petitioner's cottage.[5]

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[3] 16 U.S.C. § 459b-3(d).

[4] *Webster's New Collegiate Dictionary*, G. & C. Merriam Co. (1980).

[5] Petitioner, Grace E. Bessay, owns a cottage and 8.17 acres of land within Tract No. 8-P-1036 of the Cape Code National Seashore in an area of the dunes in Provincetown, Massachusetts, known as "Peaked Hill." Ms. Bessay's cottage is typical of the other dune cottages at Peaked Hill. It has two rooms, measures eighteen-and-one-half by sixteen-and-one-half feet, and has a five-foot wide porch along the length of the building. The cottage is equipped with a kitchen sink, a gas cooking stove and a gas refrigerator. The cottage does not have electricity or indoor plumbing. Instead, like most Peaked Hill dune cottages it is lighted primarily with kerosene lamps and is supplied with potable water from its own well. The cottage has a chemical toilet for sanitary disposal of human wastes.

That is the crux of this case: an extensive legislative history in which Congress made it clear that it wanted to preserve in private ownership preexisting, detached, one-family residences on the beach, and the use of the word "dwelling" to define what property would be protected from the eminent domain power of the Secretary of the Interior.

Notwithstanding the clarity of the intent of Congress, and notwithstanding the simple, straightforward meaning of the word as used by Congress, *i.e.*, "dwelling," the National Park Service condemned the cottage of an elderly home owner on Cape Cod, Grace E. Bessay. Incredibly, the District Court and then the First Circuit Court of Appeals condoned the actions of the National Park Service. In so doing, the District Court and then the First Circuit Court of Appeals ignored the extensive legislative history and evidence of Congressional intent in The Cape Cod National Seashore Act; went beyond the words of the statute in defining "dwelling;" went beyond the ordinary, contemporary, and common definition of "dwelling;" and failed to strictly construe the grant of the power of eminent domain.

It is this decision from which Ms. Bessay seeks relief in the power of this Honorable Court to review decisions from below which are in direct and intolerable conflict with the decisions of this Honorable Court. It is from this decision that *amici* seek review for the far-reaching and devastating impact it will have upon thousands of men and women who are similarly situated.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS CREATES A DIRECT AND INTOLERABLE CONFLICT WITH THE DECISIONS OF THE U.S. SUPREME COURT.

The decision of the First Circuit Court of Appeals upholding the decision of the District Court is in direct

and apparent conflict with numerous decisions of this Honorable Court.

A. The Decision Of The First Circuit Court Of Appeals Is In Direct And Apparent Conflict With Decisions Of This Honorable Court Regarding Statutory Construction And The Definition Of Words In The Statute In Question.

In direct and apparent conflict with the holdings of this Honorable Court, the District Court and then the First Circuit Court of Appeals ignored the "ordinary, contemporary, [and] common meaning" of the word "dwelling" as contained in the Federal statute.

As this Honorable Court has noted on numerous occasions:

> A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. (Citations omitted.) Therefore, we look to the ordinary meaning of the term "[dwelling]" at the time Congress enacted the statute in 1961.

Perrin v. United States, 444 U.S. 37, 42 (1979); *Accord, Lukhard v. Reed*, 481 U.S. 368, 386 (1987); *Diamond v. Diehr*, 450 U.S. 175, 182 (1980); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975); *Banks v. Chicago Grain Trimmers Assn., Inc.*, 390 U.S. 459, 465 (1968); *Miner v. Mechanics Bank of Alexandria*, 1 Pert 46, 64 (1828); *See* also *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980).

Further:

> When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily "the end of the matter." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L Ed 2d 694, 104 S. Ct. 2778 (1984). "Going behind the plain language of a statute in search of a possible contrary congressional intent is a step to be taken cautiously even under the best of circumstances."

United States v. Locke, 471 U.S. 84, at 95-96, 86 L Ed 2d 64, 105 S. Ct. 1785 (1985).

Amoco Production Co. v. Gambell, 480 U.S. 531, 553 (1987).

How could the First Circuit Court of Appeals possibly conclude that "dwelling," as used by Congress, meant only those places of abode that possessed indoor plumbing and electricity? The "ordinary, contemporary, common meaning" of "dwelling" required only that it be "a building or other shelter in which people live."

In 1961, when Congress adopted The Cape Cod National Seashore Act, millions of Americans were living in "dwellings" or "housing units" which did not have indoor plumbing.[6] As the Census conducted in 1960 reveals, 4,127,667 of the 58,326,357 "housing units" did not have indoor plumbing; 5,978,261 did not have indoor toilet facilities, and 6,921,639 – that is, 12% of the "housing units" in the United States – did not have a bathtub or shower. In other words, 12% of the "housing units" in the United States would not have qualified as "dwellings" under the holding of the First Circuit Court of Appeals here challenged.[7]

In 1960, in many regions of the country, a very significant portion of the buildings or other shelters in which Americans lived did not have indoor plumbing. For example, in Mississippi 210,666 of the 628,945 housing units

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[6] The Bureau of the Census did not ascertain the number of homes which did not have electricity in 1960. However, according to the Rural Electrification Administration (REA), in 1960 approximately 400,000 out of the 5,200,000 rural households served by the REA were without electricity. That is, 7% of REA households were without electricity in 1960. Annual Statistical Report, Bulletin 1-1, Rural Electrification Administration, vii (1960).

[7] United States Census of Housing 1960, Final Report HC(1)-1, United States Department of Commerce, Bureau of the Census, Table 3.

did not have indoor plumbing; 247,971 did not have indoor toilet facilities, and 273,663 did not have a bathtub or shower. Numerous other states had similar figures.[8]

Even in Massachusetts, 7,571 of the 1,690,998 housing units did not have indoor plumbing; 15,334 did not have indoor toilet facilities; 58,741 did not have a bathtub or shower.[9]

Does the First Circuit truly believe that during the period from 1959 to 1961 when Congress was considering The Cape Cod National Seashore Act, it chose to use a word for the place where someone lives which did not

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[8] *Id.* In Virginia, 177,273 of the 1,168,913 housing units had no indoor plumbing; 252,034 had no indoor toilet facilities and 271,983 had no bathtub or shower. In Minnesota, 113,128 of the 1,119,271 housing units had no indoor plumbing; 154,619 had no indoor toilet facilities and 181,566 had no bathtub or shower. In New York, 66,034 of the 5,695,880 housing units had no indoor plumbing; 101,085 had no indoor toilet facilities and 163,189 had no bathtub or shower. In New Jersey, 15,753 of the 1,998,940 housing units had no indoor plumbing; 28,803 had no indoor toilet facilities and 61,265 had no bathtub or shower. In Illinois, 120,108 of the 3,275,799 housing units had no indoor plumbing; 185,045 had no indoor toilet facilities and 231,406 had no bathtub or shower. In Colorado, 32,209 of the 594,522 housing units had no indoor plumbing; 49,124 had no indoor toilet facilities and 52,834 had no bathtub or shower. In Arizona, 24,562 of the 415,834 housing units had no indoor plumbing; 35,541 had no indoor toilet facilities and 38,337 had no bathtub or shower. In California, 44,065 of the 5,465,870 housing units had no indoor plumbing; 93,220 had no indoor toilet facilities and 98,320 had no bathtub or shower.

[9] *Id.* The fact that 58,741 "housing units" in Massachusetts did not have a bathtub or shower makes it clear that the Minimum Standards of Fitness for Human Habitation promulgated by the Massachusetts Department of Public Health upon which the First Circuit erroneously relied is not the mandatory requirement that the First Circuit concluded that it was.

apply to 6,921,639 of the "housing units" in the country, or 58,741 "housing units" in Massachusetts? Such a conclusion strains credulity.

This Honorable Court should grant *certiorari* in the instant matter to reaffirm that words of a statute are to be given their "ordinary, contemporary, common meaning." To do otherwise is to permit lower courts to read into a statute a meaning that was not, and could never have been, intended by Congress.

B. The Decision Of The First Circuit Court Of Appeals Is In Direct And Apparent Conflict With Decisions Of This Honorable Court Which Recognize That Congress Expresses Its Intent Through The Language It Chooses.

This Honorable Court has made it quite clear that there is a strong presumption that Congress expresses its intent through the very language it chooses. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). *See United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In the instant matter, Congress purposefully selected the word "dwelling," which it chose not to define further.[10] Rules of statutory construction require that we take Congress at its word. If Congress had meant to limit the protection from eminent domain which it was enacting into law, it could have limited that protection to, for

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[10] In The Cape Cod National Seashore Act, Congress modified the word "dwelling" by requiring that such dwellings be "detached," that they be "one-family," and that their construction began "before September 1, 1959." Congress could have further modified "dwelling" so as to limit its applicability. It did not do so.

example, "dwellings" with indoor plumbing and electricity.[11] It did not do so.[12]

In the absence of an affirmative decision by Congress to limit the breadth of the protection from the Government's power of eminent domain, no court may sanction the adoption of another definition which is significantly narrower than the one adopted by Congress. This the National Park Service seeks to do.[13]

This Honorable Court should grant *certiorari* in the instant matter to reaffirm that the words of a statute, as selected by Congress, are interpreted as intended by Congress. To do otherwise is to permit lower courts to ignore the words used by Congress and to read into the statute a meaning that was not, and could never have been, intended by Congress.

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[11] For example, Congress required compliance with the zoning by-laws adopted by each of the six towns pursuant to the regulations adopted by the Secretary of the Interior. Congress could have required – but did not require – compliance with state health and housing codes.

[12] Any word that Congress could have selected would have required modifying language to restrict protection from eminent domain to "housing units" with indoor plumbing and electricity. That is the case because each of those words necessitates little more than the proverbial roof over one's head: abode, domicile, lodging, residence, room, apartment, cottage, house, home, habitation, cabin, hut, shelter, quarters, bungalow, chalet, lodge, castle, chateau, estate, manor, villa, hovel.

[13] The National Park Service seeks to mutate the word "dwelling" from its ordinary, contemporary and common meaning into a new word the definition of which includes indoor plumbing and electricity.

C. The Decision of the First Circuit Court of Appeals Is in Direct and Apparent Conflict With Decisions of This Honorable Court Which Sharply Limit The Grant of Eminent Domain Authority.

The District Court and the First Circuit Court of Appeals failed to strictly construe the statutory grant of the power of eminent domain by their erroneous interpretation of the word "dwelling" as contained in the Federal statute.

This Honorable Court has long recognized that "the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed." *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 192 (1928).[14]

Notwithstanding this rule of statutory interpretation, the First Circuit Court of Appeals, rather than strictly

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[14] This proposition could not be more fundamental:

> As a general thing, statutes conferring the power of eminent domain are to be strictly construed against the one exercising the power and in favor of the landowner, since the exercise of the power of eminent domain is in derogation of the right of the citizen. Such statutes are not to be extended or broadened by inference or implication or by judicial construction. A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. The person or body claiming the right to exercise such delegated power must be able to point to the statute which either expressly or by necessary implication confers that right. Authority cannot be implied by or inferred from vague or doubtful language; when the matter is doubtful, it must be resolved in favor of the property owner.

26 Am. Jur. 2d, *Eminent Domain*, §18 (1966).

construing the power to condemn, gave that power one of the most expansive definitions possible. Thus the First Circuit Court of Appeals has turned an important rule of statutory construction on its head. While this Honorable Court has been carefully crafting the doctrine of regulatory takings to ensure the sanctity of constitutionally protected property rights,[15] the First Circuit Court of Appeals has greatly diminished those rights.

This Honorable Court should grant *certiorari* in the instant matter to ensure that rules of statutory interpretation meant to protect property rights be preserved. To do otherwise is to permit lower courts to interpret statutes so as to further diminish the protection afforded by the Constitution of our private property rights.

II. THE FIRST CIRCUIT COURT OF APPEALS IGNORED THE CLEAR LEGISLATIVE HISTORY OF THE CAPE COD NATIONAL SEASHORE ACT IN ITS ERRONEOUS INTERPRETATION OF THE WORD "DWELLING" AS CONTAINED IN THAT ACT, AND THEREBY BREACHED THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS.

The First Circuit Court of Appeals, by ignoring the clear legislative history of The Cape Cod National Seashore Act, is not interpreting the law, but is enacting legislation. At the very least, the First Circuit Court of Appeals is sanctioning the effort of the National Park Service to enact legislation rather than to enforce the law. In either case, the First Circuit Court of Appeals has breached the separation of powers doctrine as contained in our Constitution.

The legislative history in the instant matter could not have been more clear. The Congress repeatedly indicated that it wanted to preserve intact the cottages that dot the

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[15] *See*, for example, *Nollan v. California Coastal Commission*, 483 U.S 285 (1987).

Cape Cod seashore and that give that seashore its rich character. There is absolutely no language that indicates otherwise.[16]

The legislative history accompanying The Cape Cod National Seashore Act makes it clear that it was the intent of Congress to protect the private property rights of the owners of the preexisting structures within the 30,000 acres comprising the Cape Cod National Seashore.

> The bill encourages the Department of the Interior to give the respected and responsible property owners of the lower Cape living within the seashore area and their children *the most sympathetic consideration and cooperation;* enabling them to hold and administer their property *as they have in the past* . . . .

S. Rep. No. 428, 87th Cong., 1st Sess. 12, *reprinted in* 1961 *U.S. Code Cong. & Ad. News* 2212, 2221. (Emphasis added.)

On September 3, 1959, the late U.S. Senator John F. Kennedy stated, when introducing the bill on the floor of the Senate:

> Cape Cod is more heavily settled . . . than most previous park areas. . . . We have therefore . . . made several provisions which afford a method by which the threat of residential property condemnation can be eliminated by local action.
>
> * * *
>
> In any of the six towns which adopt zoning meeting standards defined by the Secretary of the Interior, *all homeowners* in those towns whose property lies within the diagram of the Park *are assured of the right to continue to own and occupy their home without interruption or interference so long as the zoning is kept in force.*

105 Cong. Rec. 17888 (1959). (Emphasis added.)

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[16] The absence of any legislative history to support the position taken by the National Park Service may be one reason for the silence of the United States Government in response to Ms. Bessay's petition.

The then Director of the National Park Service, Conrad L. Wirth, testified:

> This bill states that *we have no power of domain over a home.* Therefore that home can remain there as long as it complies with the zoning which the Secretary of the Interior approves, namely, that it be kept as a residence.

Cape Cod National Seashore Park: Hearings on S.857 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess. 42 (1961). (Emphasis added.)

Congress clearly sought to preserve the natural ecological balance of portions of lower Cape Cod, while permitting area residents to continue their unique lifestyle. Congress recognized that the simple, residential homes fit into the natural ecological balance:

> Generally, the seashore proposal involves open and forested lands and some portions with scattered homes and cottages. Included are a few isolated groups of cottage rental units of primitive seashore type and several small snack and curio stands. By and large, the homes and cottages are seasonal in use, and until recent years, widely scattered.

S. Rep. No. 428, 87th Cong., 1st Sess. 9-10, *reprinted in* 1961 *U.S. Code Cong. & Ad. News* 2212, 2218.

The Act specifically requires that the area be managed "in such a way as not to diminish the value or enjoyment of any residential property in the seashore. . . ." *Id.*, at 29, *reprinted* at 2236. In fact, Congress specifically referenced certain groups of seasonal dwellings it intended to exempt from condemnation:

> In 1957, there were 1,136 *seasonal homes* and 554 *all-year residences* in the town of Eastham. Within the Eastham portion of the proposed seashore, there were 98 *seasonal homes* and 60 *all-year residences.* In Truro there were 665 *seasonal homes* and 207 *all-year residences,* with 185 *seasonal* and 68 *all-year residences* within the proposed area. *There are 5 to 7 seasonal homes in Orleans,*

> *about 10 in Provincetown and 5 to 7 in Chatham ranging in value from $200 to $2,000.*

Id., at 10, *reprinted* at 2219.[17] (Emphasis added.)

On the floor of the U.S. Senate, U.S. Senator Bible stated on June 27, 1961:

> Great care has been taken in the bill to provide for the continued ownership and use of the rather substantial number of private homes which exist on Cape Cod within the suggested boundaries of this national seashore. *The report delineates in detail, on page 10, the homes which are located within the proposed boundaries of the Cape Cod National Seashore.* So long as the homes in private ownership are maintained in accordance with zoning provisions adopted by the affected towns that conform to standards established by the Secretary of the Interior, the Secretary's authority to condemn such private property will be suspended.

107 Cong. Rec. 11391 (1961).[18] (Emphasis added.)

This Honorable Court should grant *certiorari* in the instant matter to ensure that the legislative history which accompanied the adoption of The Cape Cod National Seashore Act is given full force and effect and that the interpretation that is given to the words of the statute is

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[17] Ms. Bessay's home in Provincetown was one of the ten homes mentioned by Congress. It is unlikely, even in 1957, that a home valued at $200 could have been equipped with such modern conveniences as electricity and indoor plumbing.

Note that in its discussion of the cottages which it sought to protect, Congress spoke of "seasonal homes" and "all year residences." Both words, "homes" and "residences," are synonymous with "dwelling," and clearly necessitate further modifying language to restrict application of the protection from eminent domain to "housing units" with indoor plumbing and electricity.

[18] The list of homes which Congress meant to protect from the power of eminent domain is the one above at footnote 17.

consistent with that extensive legislative history. To do otherwise is to permit lower courts and agencies of the Executive Branch to violate the separation of powers doctrine by engaging in acts which are restricted to the Legislative Branch.

III. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER OF FEDERAL LAW AND GENERAL LAW.

The holding of this Honorable Court that "[w]hen statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter,' " has been adhered to by every Circuit Court of Appeals. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). For example, *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 900 (2d Cir. 1989); *Garrett v. Lyng*, 877 F.2d 472, 474 (6th Cir. 1989); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 399 (9th Cir. 1989).

In the instant matter, the failure of the First Circuit Court of Appeals to use the "ordinary, contemporary, common meaning" of the word "dwelling," and its failure to limit its interpretation of The Cape Cod National Seashore Act to the word selected by Congress, puts the instant decision in conflict with the decisions of other circuits which are consistent with those of this Honorable Court.

This Honorable Court should grant *certiorari* in the instant matter to reaffirm that words of a statute are to be given their "ordinary, contemporary, common meaning." To do otherwise is to permit lower courts to read into a statute a meaning that was not, and could never have been, intended by Congress.

IV. THE ISSUES INVOLVED IN THIS PETITION ARE CRITICALLY IMPORTANT TO CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS WHICH WILL BE ADVERSELY AFFECTED NOT JUST IN THE INSTANT CASE BUT THROUGHOUT THE UNITED STATES.

The decisions of the District Court and the First Circuit Court of Appeals, by giving a federal statute an unwarranted and improper construction, adversely affect important constitutional issues including the right of the American people to be safe from takings unauthorized by the U.S. Congress. Obviously the petitioner, Ms. Bessay, will suffer mightily should the decision of the First Circuit Court of Appeals be left standing. However, much more is at stake here than the future of Ms. Bessay – as troubling as that future is without her beloved but admittedly humble cottage.

The language used by Congress to protect Ms. Bessay and others like her, that is, the "improved property" language in The Cape Cod National Seashore Act, is often referred to as the "Cape Cod formula." That formula has been used by Congress to protect the property rights of those within the boundaries of newly created national parks.

Congress has used the "Cape Cod formula" in scores of subsequent statutes. If the decision of the First Circuit Court of Appeals is permitted to stand, then the "Cape Cod formula" which was meant to serve as the shield by which the property rights of inholders are protected, will instead become the sword with which those property rights will be taken away.

Amici represent the hundreds of Americans who own property within the boundaries of areas such as the Cape Cod National Seashore. Not surprisingly, given the areas which are deemed appropriate for designation as components of America's national park system, the "dwellings" within these boundaries are often "rustic," possessing neither indoor plumbing nor electricity. Obviously that does not mean that they are not "dwellings," merely that

– under the decision of the First Circuit – they would not qualify for protection from the exercise of the power of eminent domain by the National Park Service.

The problems presented to this Honorable Court by the instant petition go far "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The erroneous decision of the First Circuit Court of Appeals will mean that hundreds of Americans – who were assured by Congress that their "dwellings" would not be subject to the threat of unbridled application of the power of eminent domain by the United States Government – can have their property condemned at the whim of the National Park Service.

This petition presents an important constitutional issue – the protection of our most basic right, the right to own property. The decision by the First Circuit Court of Appeals could not be more erroneous. In light of the number of Americans who will be affected by this dangerous precedent a grant of *certiorari* is compelled.

CONCLUSION

The last motion picture in which the great Bette Davis appeared before her death in 1989 was the critically acclaimed *The Whales of August*. Ms. Davis and her co-star, Lillian Gish, portrayed two sisters who for sixty summers had returned to their humble cottage off the coast of Maine where they awaited the return of the whales of August. One summer, however, they must decide whether to give up their rustic family home along with their independence and life together.

If the National Park Service had scripted this story of survival, hope and triumph, the sisters would never have returned to their cottage to watch the whales of August, to reminisce on the decades spent at the shore, and to decide on their future. Instead the sisters' cottage would have failed to qualify as a "dwelling," they would have been evicted from their summer cottage, and they would

have spent their golden years far from the shore they loved.

Ms. Bessay is now in that very position. The interpretation placed by the National Park Service upon the Act of Congress is an outrageous one, unsupported by fact or law. It is directly contrary to the will of Congress. The decision of the First Circuit Court of Appeals is fundamentally flawed and cannot be permitted to stand. If it does, not only Ms. Bessay will suffer, but so too will hundreds of Americans whose property lies within federal boundaries, who thought their property was entitled to protection from the eminent domain powers of the United States Government.

Accordingly, this Honorable Court should grant the Writ of *Certiorari* and reverse the ruling below.

Indeed, so egregious and without basis is the decision of the First Circuit that this Honorable Court is hereby respectfully urged to reverse the decision of that court based upon the petition and this brief *amici curiae*.

Respectfully submitted,

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